

Naïve Administrative Law: Complexity, Delegation and Climate Policy

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The Supreme Court’s ongoing efforts to narrow the contours of administrative agencies’ policymaking discretion comes at a particularly inopportune time. The nation faces a set of increasingly complex and pressing national problems, including climate change, that require the simultaneous application of careful deliberation and expertise, something Congress is ill-suited to do in the best of times—but particularly so in this hyper-polarized era. Were the Court to fully embrace the Major Questions Doctrine, it would likely render environmental and energy regulators powerless to reduce greenhouse gas (GHG) emissions from the energy sector under their enabling statutes, despite the centrality of that task to their missions and plausible arguments that Congress has already delegated them that power. It would also call into question the legitimacy of many other existing regulatory regimes, throwing regulatory policy into chaos. The Doctrine draws a flawed distinction between policymaking and policy implementation based upon the economic and political significance of the decisions involved; if there is a useful distinction to be made between those two activities, it rests on the distinction between ends and means, the what questions and the how questions. The Framers’ design requires that Congress be able to delegate these difficult, complex, contentious “how” questions to the executive branch. Now more than ever, regulatory agencies—not Congress—can best produce decisions that reflect the “permanent and aggregate interests of the community.”

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Introduction

Twenty-first-century administrative jurisprudence is becoming increasingly ill-suited to twenty-first-century governance challenges. The magnitude and complexity of these challenges place a premium on both expertise and deliberation, but in today's hyper-polarized, populist political environment, Congress lacks the deliberative capacity to meet these challenges. Yet the federal courts seem increasingly inclined to move difficult, complex decisions out of regulators' hands and into those of Congress. The Supreme Court is driving this trend, most recently by agreeing to hear a series of challenges to EPA climate rules under the Clean Air Act.¹ The Court's effort is based upon a naïve understanding of both modern congressional politics and the administrative state, and Congress is not likely to rise to the challenge presented by the Court. To the contrary, by weakening administrative policymaking, the Court is amplifying the forces undermining American liberal democracy and hobbling the nation's ability to address a climate emergency that has already begun to inflict massive costs on American society.

Climate change presents an urgent, politically complex policy problem that Congress is particularly ill-suited to resolve. The forces that drive anthropogenic climate change are well-understood and grounded in a decades-old consensus in the scientific community: namely, that in order to avoid the worst effects of climate change, the world must take steps immediately to sharply reduce carbon emissions.² That consensus has spawned increasingly urgent calls to policy action from the scientific community in recent years, reflected in (a) the Intergovernmental Panel on Climate Change's³ (IPCC) 2016 endorsement of the goal of reaching net zero⁴ carbon emissions within the next few decades, and (b) new warnings published in its 6th Assessment Report in 2021⁵ that rapid emissions reductions are necessary now. The costs imposed by unchecked climate change dwarf those associated with acting now to mitigate those

1. The cases were consolidated under *West Virginia v. EPA* (D.C. Cir., Docket No. 20-1530, October 2021 term). At the time of this writing, these cases have been argued, but not decided.

2. Eric Roston & Akshat Rathi, *Climate Scientists Reach 'Unequivocal' Consensus on Human-Made Warming in Landmark Report*, BLOOMBERG GREEN (Aug. 9, 2021), <https://www.bloomberg.com/news/features/2021-08-09/ipcc-report-human-caused-climate-change-unequivocal> [<https://perma.cc/G2B5-CC9V>] (describing the expert consensus as reflected in the IPCC's 6th Assessment Report, *infra* note 4, calling the report a "code red for humanity").

3. The IPCC is an aggregator and coordinator of climate research whose published conclusions reflect worldwide scientific consensus opinion among climatologists and geophysicists. *See About The IPCC*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (2021), <https://www.ipcc.ch/about/> [<https://perma.cc/LRU4-TL8V>].

4. The term "net zero" reflects the IPCC's conclusion that reaching zero emissions is either impossible or impractical, and that negative emissions technologies will be necessary to create an economy that emits some carbon but offsets those emissions by capturing and sequestering some already-emitted carbon.

5. Richard P. Allan et al., *Climate Change 2021: The Physical Science Basis*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf [<https://perma.cc/45CR-4YG4>].

impacts,⁶ and the United States is now experiencing the very sorts of harms climate models have long predicted. A warming, expanding ocean is causing more frequent coastal flooding, necessitating either massive infrastructure investments to hold back the sea or the relocation of entire towns.⁷ Warmer oceans make hurricanes stronger.⁸ Inland severe weather (particularly heat waves) is more severe more often, portending a future of more expensive (or less available) insurance and mortgages for owners of property affected by these changes.⁹

While a majority of voters support mitigative policy action now,¹⁰ crafting a national response to the climate challenge has eluded Congress; Congress's attempts to address the climate crisis have failed amid the bitter partisan polarization that has crippled the legislative process in the 21st century. After serious-but-failed attempts to create a national climate policy in 2010 and 2021, Congress seems very unlikely to embrace a rapid transition to a net zero carbon emission economy any time soon, particularly given hardened Republican opposition to that objective.¹¹ There is now a sharp ideological divide between

6. *Health Benefits Far Outweigh the Costs of Meeting Climate Change Goals*, WORLD HEALTH ORG. (Dec. 5, 2018), <https://www.who.int/news/item/05-12-2018-health-benefits-far-outweigh-the-costs-of-meeting-climate-change-goals> [<https://perma.cc/M5AC-JRG3>] (explaining that the high benefit-cost ratio of meeting the Paris Agreement goals is attributable to the more than one million deaths that would be averted).

7. *What Climate Change Means for Florida*, EPA (Aug. 2016), <https://www.epa.gov/sites/default/files/2016-08/documents/climate-change-fl.pdf> [<https://perma.cc/AG38-4SV8>] (detailing a frightening array of effects, many of which have already begun); Neha Thirani Bagri, *The US is Relocating an Entire Town Because of Climate Change. And This Is Just the Beginning*, QUARTZ (June 5, 2017), <https://qz.com/994459/the-us-is-relocating-an-entire-town-because-of-climate-change-and-this-is-just-the-beginning/> [<https://perma.cc/GEV6-HABL>] (describing the massive effort to relocate the village on Isle de Jean Charles, LA, which is being overtaken by the Gulf of Mexico); Rachel Waldholz, *Alaskan Village, Citing Climate Change, Seeks Disaster Relief In Order To Relocate*, NPR (Jan. 10, 2017), <https://www.npr.org/2017/01/10/509176361/alaskan-village-citing-climate-change-seeks-disaster-relief-in-order-to-relocate> [<https://perma.cc/QY26-A9WL>] (describing how thawing of the frozen permafrost underneath the village of Newtok, AK is eroding away land along a river, necessitating relocation). The costs to human life, the public fees, and private capital are almost incalculably large.

8. Jeff Berardelli, *How Climate Change is Making Hurricanes More Dangerous*, YALE CLIMATE SOLUTIONS (July 8, 2019), <https://yaleclimateconnections.org/2019/07/how-climate-change-is-making-hurricanes-more-dangerous/> [<https://perma.cc/B8FA-RN7F>].

9. Claire Wilkinson, *Property Insurers Tighten Coverage as Climate Change Continues*, BUS. INS. (Aug. 17, 2021), <https://www.businessinsurance.com/article/20210817/NEWS06/912343906/Property-insurers-tighten-coverage-as-climate-change-continues> [<https://perma.cc/W9ZR-EKNU>]; Christopher Flavell, *Rising Seas Threaten a National Institution: The 30-Year Mortgage*, N.Y. TIMES (Mar. 2, 2021), <https://www.nytimes.com/2020/06/19/climate/climate-seas-30-year-mortgage.html#:~:text=Caplin%20said,.of%20reach%20for%20more%20Americans> [<https://perma.cc/7HT3-FKET>].

10. See, e.g., Alec Tyson & Brian Kennedy, *Two-Thirds of Americans Think Government Should Do More on Climate*, PEW RSCH. CTR. (June 23, 2020), <https://www.pewresearch.org/science/2020/06/23/two-thirds-of-americans-think-government-should-do-more-on-climate/> [<https://perma.cc/K2D3-VWQ7>]; Justin McCarthy, *Most Americans Support Reducing Fossil Fuel Use*, GALLUP (Mar. 22, 2019), <https://news.gallup.com/poll/248006/americans-support-reducing-fossil-fuel.aspx> [<https://perma.cc/7DGP-5T9X>].

11. There is more support for action among the party's younger voters, but not majority support. Alec Tyson, *On Climate Change, Republicans Are Open to Some Policy Approaches, Even as they Assign the Issue Low Priority*, PEW RSCH. CTR. (July 23, 2021), <https://www.pewresearch.org/fact-tank/2021/07/23/on-climate-change-republicans-are-open-to-some-policy-approaches-even-as-they->

the parties over this issue, and more broadly over the role of government in the economy.¹² Furthermore, Americans' increasing tribal attachment to party¹³ is separating voter policy preferences on issues like climate change from their voting decisions. Meanwhile, states, cities,¹⁴ commercial and industrial customers,¹⁵ and even some electric utilities¹⁶ have begun to take action to reduce

assign-the-issue-low-priority/ [https://perma.cc/S4W8-8KRG] (showing climate change is “not an important concern” to most Republicans, but younger Republicans had higher levels of support for action to address climate change).

12. For an exploration of data documenting sharply increasing ideological polarization between the parties over the last few decades, see *infra* Section II.C.

13. See, e.g., *Partisan Antipathy: More Intense, More Personal*, PEW RSCH. CTR. (Oct. 10, 2019), <https://www.pewresearch.org/politics/2019/10/10/partisan-antipathy-more-intense-more-personal/> [https://perma.cc/YM4J-ARDK] (describing the various ways in which Democrats and Republicans ascribe negative personal characteristics to each other, including the belief that members of the opposing party are “more immoral” than other people). Political scientists describe this trend as “affective, negative polarization,” a combination of two ideas: (i) the intermingling of party affiliation with one’s personal identity, more so than a party’s policy agenda, and (ii) political action and sentiment motivated more by opposition to the other party than attachment to one’s own party. For further explanations of these ideas, see, for example, Shanto Iyengar et al., *The Origins and Consequences of Affective Polarization in the United States*, 13 ANN. REV. POL. SCI. 39 (2019); and James N. Druckman et al., *Affective Polarization, Local Contexts and Public Opinion in America*, 5 NATURE HUM. BEHAV. 28 (2021).

14. The lagging national response to the threat of climate change belies recent progress in the states and the private sector. A growing-but-significant minority of states have taken strong steps toward realizing a net zero emission economy by the middle of the 21st century. For example, in California, then-Governor Jerry Brown signed a bill mandating 50% of California’s electricity to be powered by renewable resources by 2025 and 60% by 2030, while calling for a “bold path” toward 100% zero-carbon electricity by 2045. See Press Release, *Governor Brown Signs 100 Percent Clean Electricity Bill, Issues Order Setting New Carbon Neutrality Goal*, OFFICE OF THE CAL. GOVERNOR (Sept. 10, 2018), <https://www.ca.gov/archive/gov39/2018/09/10/governor-brown-signs-100-percent-clean-electricity-bill-issues-order-setting-new-carbon-neutrality-goal/index.html> [https://perma.cc/AD9X-7MW5]; CAL. PUB. UTIL. CODE § 399.11 (West 2019); CAL. PUB. UTIL. CODE § 399.15 (West 2019); CAL. PUB. UTIL. CODE § 399.30 (West 2019). Hawaii has established a goal of 100% renewable electricity sources by 2045. HAW. REV. STAT. § 269-92 (2018). New York State’s Climate Leadership and Community Protection Act calls for all the state’s electricity to come from carbon-free sources by 2030, 70% of which must be from renewable sources. N.Y. Env’t. Conserv. Law § 75-0103 (McKinney 2017). The State of Washington’s 2019 Clean Energy Transformation Act requires all electric utilities in Washington to transition to carbon-neutral electricity by 2030. WASH. REV. CODE ANN. § 19.285.040 (West 2021). New Mexico has mandated that the state’s publicly regulated utilities receive all of their electricity from carbon-free sources by 2045. Energy Transition Act, 2019 Bill Text NM S.B. 489 (official classification pending). And other states are establishing ambitious goals that nevertheless stop short of complete elimination of carbon emissions: for example, Minnesota law establishes a goal of reducing greenhouse gas emissions by 80% by 2050. MINN. STAT. § 216H.02 (2021). Similarly, Aspen, Colorado, Georgetown, Texas and more than 100 other American cities have pledged to meet their electricity needs using “100 percent renewable” energy. SIERRA CLUB (Apr. 5, 2019), www.sierraclub.org/ready-for-100/commitments [https://perma.cc/XEM2-ZD7L].

15. See Julia Pyper, *The Latest Trends in Corporate Renewable Energy Procurement*, GREENTECH MEDIA (June 30, 2017), www.greentechmedia.com/articles/read/the-latest-trends-in-corporate-renewable-energy-procurement [https://perma.cc/FWG7-7H9K] (describing exponential growth in demand recently); *The Growing Demand for Renewable Energy Among Major U.S. and Global Manufacturers*, D. GARDINER & ASSOC. (Sept. 12, 2017), www.dgardiner.com/wp-content/uploads/2017/09/Renewable-Energy-and-Climate-Commitments-in-the-Manufacturing-Sector_FINAL9.19.2017FINAL.pdf [https://perma.cc/DNJ3-A84R] (describing the prevalence of clean energy goals among major manufacturers).

16. Several major investor-owned utilities have recently pledged to rapidly reduce their reliance on fossil fuels: Xcel Energy, serving parts of Minnesota and Colorado, has pledged to rely only on generation that emits no carbon dioxide at all (100% emission reduction) by 2050. See, e.g., *Building a Carbon Free Future*, XCEL ENERGY, (Feb. 2019), <https://www.documentcloud.org/documents/6409805-Xcel-Energy-Carbon-Report.html> [https://perma.cc/WTN8-RK4Q].

their carbon footprints.¹⁷ But their actions will not be nearly enough to keep warming below the target threshold of two degrees Celsius. It is generally agreed that in order to reach that target the economy must transition to net zero emissions of greenhouse gases by mid-century, something that market forces and state policies are unlikely to be able to accomplish on their own.

In the absence of new climate legislation, regulatory agencies like the Environmental Protection Agency (EPA) and the Federal Energy Regulatory Commission (FERC) are left to grapple with the climate problem. They do so, however, only when Democrats control the executive branch, and under aging enabling statutes that seem to authorize effective climate solutions only vaguely, or in indirect ways. Problematically, in recent decades the federal courts have weakened traditional administrative-law deference doctrines, and now the Supreme Court is exploring the idea of a new kind of Nondelegation Doctrine,¹⁸ one skeptical of agencies' exercise of delegated discretion to make consequential decisions.¹⁹ This could not come at a more inopportune time for climate policy—and by extension, for governance more generally.

This Article explores how this trend hamstringing the ability of the regulators—the EPA and FERC—to respond to the climate challenge now and in the future, and argues that this narrowing of the congressional power to delegate policymaking discretion flies in the face of the theory of governance on which the Constitution is based. Part I of this Article reviews recent administrative-law jurisprudence that narrows administrative power and discretion, and it explores how these new standards weaken regulators' ability to use existing statutes to address the climate challenge. Part II focuses on the dimming prospects for strong climate legislation in the future and explains why delegation of important decisions to experts is both good policymaking and good

17. Despite the adoption of aggressive decarbonization goals by some states, many others seem firmly disinclined to aim for a net zero emission future. These include states like Texas, West Virginia, North Dakota and others where the fossil fuel industry is important, as well as ideologically conservative states without significant fossil fuel industries in which leaders and voters cast a skeptical eye on the notion of a green-energy transition (and too often, climate science itself). For example, after winter storm Uri in February 2021, the Governor of Texas inaccurately blamed wind and solar generators for the power failure, and proposed changes to the Texas electricity market that would reallocate electric grid balancing costs that are now borne by ratepayers everywhere in the country to owners of renewable generation. See Press Release, *Governor Abbott Directs Public Utility Commission To Take Immediate Action To Improve Electric Reliability*, OFFICE OF THE TEX. GOVERNOR (July 6, 2021), <https://gov.texas.gov/news/post/governor-abbott-directs-public-utility-commission-to-take-immediate-action-to-improve-electric-reliability> [<https://perma.cc/VD3T-FPWE>].

18. Of course, the Nondelegation Doctrine states that it would violate separation of powers for Congress to delegate “legislative powers” to the executive branch. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) (“Congress is not permitted to abdicate or to transfer to others the essential legislative function”); *J.W. Hampton v. United States*, 276 U.S. 394, 409 (1928) (specifying that constitutionally sufficient delegations must include an “intelligible principle” on which agencies may base their interpretive decisions). This principle has almost never been used to overturn a delegation of power to an agency.

19. As explained in Section I.B.1, among the questions taken up by the court in *West Virginia v. EPA* is whether the portion of the Clean Air Act that the Obama EPA used to regulate greenhouse gas emissions authorizes the agency to “reshap[e] the nation’s electricity grids and unilaterally decarbonize[e] virtually any sector of the economy” *West Virginia v. EPA*, (D.C. Cir., Docket No. 20-1530, October 2021 term).

politics. Part III explains why Congress cannot and should not be the locus of decision-making for problems like climate change that are characterized by immense techno-economic and political complexity, and why courts and commentators err when they suggest that delegation of consequential decisions presents constitutional problems or problems for representative democracy. Delegation of decision-making responsibility is a natural consequence of organizational growth, including the growth of nations. Indeed, it is one the Founders foresaw. When the Supreme Court distinguishes policymaking (arguably, Congress' domain) from policy implementation (agencies' domain) by focusing on the *importance* of the policy choice, the Court makes a fundamental mistake. Rather, policymaking is about the *what*, and policy implementation is about the *how*. So long as Congress has decided that an important task must be accomplished (the “what” question), it can *and often should* delegate to agencies the decisions about how that task should be accomplished, even if those are high-stakes decisions.

I. Neutering the Administrative State?

Growing judicial skepticism toward the exercise of agency discretion will impede efforts to hasten a transition to net zero carbon emissions in the American economy. In this Part, I describe briefly the jurisprudence illustrating that increasing skepticism, and I explain why it undermines regulators' attempts to use existing environmental and energy statutes to meet the climate challenge.

A. *Wither Agency Policymaking?*

Administrative law scholars see dark skies ahead for the administrative state. They say that “nondelegation originalism is having its moment,”²⁰ and that the Supreme Court is “poised to breathe new life into the nondelegation doctrine.”²¹ These predictions have proven prescient in the Supreme Court's October 2021 term.²² They followed years of Court decisions that have narrowed deference to agency interpretations of enabling legislation under the so-called “Major Questions Doctrine” and portended a resurrected Nondelegation Doctrine that “would have courts more aggressively police Congress's delegations of power to agencies.”²³ Unfortunately, these doctrinal changes are happening just as partisan acrimony and tribalism accelerate congressional

20. Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 NOTRE DAME L. REV. 243, 244 (2021).

21. Jamey Anderson, *The Nondelegation Schism: Originalism Versus Conservatism*, 2021 WISC. L. REV. 853, 853.

22. See the Court's fall 2021 acceptance of certiorari in the cases consolidated under *West Virginia v. EPA*, (D.C. Cir., Docket No. 20-1530, October 2021 term).

23. Alison Gocke, *Chevron's Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 955 (2021).

dysfunction, and as regulators confront an array of increasingly complex and intractable national policy problems.²⁴

1. The Cases: Narrowing Agency Discretion, or Eliminating It?

The familiar *Chevron* doctrine²⁵ is the two-step analysis courts apply when reviewing agency interpretations of their enabling statutes. It is one of a family of deference doctrines at the heart of administrative law,²⁶ a conceptually straightforward one based on the idea that enabling legislation implies a congressional intent to give agencies interpretive leeway in executing their statutory missions.²⁷ When reviewing an agency's interpretation of its own enabling statute, the *Chevron* doctrine requires that courts ask first if the statute speaks directly to the precise question at issue. If Congress's intent is clear, that intent decides the question. If not, the court defers to any reasonable interpretation of the issue, regardless of whether the reviewing court would have made the same choice.²⁸ This conceptual simplicity belies a malleability in application.²⁹ That malleability has permitted a recent narrowing of agency discretion by judicial conservatives, one accomplished in large part by the Major Questions Doctrine.³⁰ This doctrine represents an exception to judicial deference in circumstances involving issues of deep economic or political significance, or where the interpretive question could greatly expand the agency's regulatory authority.

24. These include historic levels of wealth and income inequality, and the health care and economic challenges caused by the ongoing COVID-19 pandemic, which has killed an estimated 899,276 Americans as of this writing in late November 2021. *COVID-19 Projections*, INST. FOR HEALTH METRICS & EVALUATION (Nov. 30, 2021), <https://covid19.healthdata.org/united-states-of-america?view=cumulative-deaths&tab=trend> [<https://perma.cc/WP78-K9RP>].

25. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). For a meta-analysis of this jurisprudence, see Peter M. Shane & Christopher J. Walker, *Chevron at 30: Looking Back and Looking Forward*, 83 *FORDHAM L. REV.* 475 (2014).

26. Courts apply *Chevron* deference to agency interpretations that have the force of law, such as those contained in rulemakings or adjudications. Courts apply so-called *Skidmore* deference to informal agency actions. See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Courts apply so-called *Auer* deference to agency interpretations of their own regulations, though the Court's recent decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), weakened *Auer* deference. See *Auer v. Robbins*, 519 U.S. 452 (1997).

27. In the words of *Chevron* majority, "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. at 843-44.

28. See *Chevron*, 467 U.S. at 844.

29. For explorations of the role of ideology in the application of the *Chevron* doctrine, see Elizabeth Fisher & Sidney Shapiro, *Disagreement About Chevron: Is Administrative Law the 'Law of Public Administration?'*, 70 *DUKE L.J. ONLINE* 111 (2021), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1084&context=dlj_online [<https://perma.cc/6FYN-W5JF>]; and Kent Barnett et al., *The Politics of Selecting Chevron Deference*, 15 *J. EMPIRICAL LEGAL STUD.* 597 (2018). Jack Beerman sees this malleability as fatal to *Chevron*'s utility. See Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron has Failed and Why It Can and Should Be Overruled*, 42 *CONN. L. REV.* 779 (2010).

30. The "major questions" doctrine has sometimes also been called the "great questions" doctrine or canon, or the "major questions exception." See, e.g., Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (or Why Massachusetts v. EPA Got It Wrong)*, 60 *ADMIN. L. REV.* 593 (2008).

This idea first appeared in the 1990s³¹ but began to capture more scholarly attention in the early twenty-first century after the Supreme Court decided the case of *FDA v. Brown & Williamson*.³² The doctrine directs courts to infer Congress's intent not only from the text or legislative history of the enabling statute itself, but also from the larger historical context of the regulatory regime—a principle colorfully evoked by Justice Scalia when he warned that Congress does not “hide elephants in mouseholes.”³³ Courts have grafted the Major Questions Doctrine into *Chevron* analysis inconsistently, but in ways that (by the time this article is published) may yield a new Nondelegation Doctrine, at least with respect to consequential policy decisions made by agencies.

In *Brown & Williamson*, the Court held that the FDA lacked the authority to regulate tobacco products as “drugs” or “devices” under the Food, Drug and Cosmetic Act (FDCA).³⁴ Noting that Congress had enacted subsequent legislation addressing the health risks of cigarette smoking in other ways, the Court concluded that “Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”³⁵ Therefore, reasoned the Court, the FDA's interpretation of the Act failed *Chevron* Step One because Congress had “directly spoken to the issue and precluded the FDA from regulating tobacco products,” even if it did so by way of the statute's historical context rather than its text.³⁶

Since the *Brown & Williamson* decision, the Major Questions Doctrine has been applied, rather unevenly, in several cases involving climate policy. In *Massachusetts v. EPA*,³⁷ the Court declined to invoke the doctrine when considering the Bush EPA's conclusion that greenhouse gases fall outside the Clean Air Act definition of “pollutant,” distinguishing *Brown & Williamson* in part because there was no history of post-Clean Air Act statutes addressing greenhouse-gas emissions analogous to those addressing the risks of cigarette smoking after passage of the FDCA.³⁸ However, seven years later the Court relied on the Major Questions Doctrine to overturn another EPA rule concerning greenhouse gas emissions. In *Utility Air Regulatory Group v. EPA (UARG)*³⁹ the Court struck down an Obama EPA rule extending greenhouse gas emissions regulation to most of the nation's large industrial emitters. Applying the Major Questions Doctrine under *Chevron* Step Two, the *UARG* Court found the EPA's interpretation of the Clean Air Act inconsistent “with the design and structure of

31. See *MCI Telecomm'ns Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 220 (1994) (rejecting the Federal Communication Commission's interpretation of its enabling legislation because the FCC did not concern itself with Congress's intended meaning in the statute).

32. *Food & Drug Admin. V. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000).

33. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-160 (2000)).

34. *Brown & Williamson*, 529 U.S. at 192.

35. *Id.* at 160.

36. *Id.* at 160-61.

37. *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007).

38. See *id.* at 530-31.

39. *Util. Air Reg'l Grp. V. EPA*, 573 U.S. 302, 315 (2014).

the statute as a whole,”⁴⁰ partly because the regulation would trigger tens of thousands of permitting proceedings, billions of dollars in administrative costs, and “decade-long delays”⁴¹—something the Court believed Congress could not have intended.

In 2015 the Court applied the Major Questions Doctrine again in *King v. Burwell*,⁴² this time at what administrative law scholars now call *Chevron* Step Zero. Asked to review an agency interpretation of the Patient Protection and Affordable Care Act (ACA) that concerned the operation of state and federal health insurance exchanges, the Court concluded that the Major Questions Doctrine rendered *Chevron* deference completely inapplicable because (a) “[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended . . . an implicit delegation [of discretion to the agency]” and (b) the issues at stake in *King* were “extraordinary,” rendering *Chevron* deference unnecessary.⁴³ Thus, *Burwell* challenged the very premise on which the *Chevron* rule is based with respect to especially consequential policy decisions.

The Court’s July 2019 decision in *Gundy v. United States*⁴⁴ undercut the constitutional legitimacy of delegation in an even more fundamental way. In *Gundy* the Court faced the question of whether Congress may delegate to the Attorney General the discretion to determine the applicability of the Sex Offender Registration and Notification Act⁴⁵ to offenders whose offenses predated the statute. Among the eight justices who decided the case,⁴⁶ a plurality of four applied traditional Nondelegation Doctrine analysis⁴⁷ to find that the statute provided the Attorney General with a sufficiently intelligible principle to guide his decision.⁴⁸ Three dissenters (led by Justice Gorsuch) disagreed, admonishing that “only the people’s elected representatives may adopt new federal laws restricting liberty,” and that only non-legislative powers to “fill up the details” can be delegated to the executive branch.⁴⁹ Justice Alito wrote separately, concurring in the plurality’s holding but expressing a willingness to consider the dissenters’ approach to delegation when and if “a majority of this Court were willing to reconsider the approach we have taken [to nondelegation doctrine challenges] for the past 84 years.”⁵⁰ The elevation of Justices

40. *Id.* at 321.

41. *Id.* at 322.

42. *King v. Burwell*, 576 U.S. 473 (2015).

43. *Id.* at 485 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

44. 139 S. Ct. 2216 (2019).

45. 34 U.S.C. § 20913(d) (2018).

46. Justice Kavanaugh had not yet been confirmed.

47. That familiar analysis looks for the presence in the statute of an intelligible principle to guide the executive branch decision-maker. *See Mistretta v. United States*, 488 U.S. 361, 372 (1989).

48. 139 S. Ct. 2216, 2123 (2019). Importantly, this analysis focuses on the constitutionality of the delegation at issue. The court had earlier signaled its intention to review delegations in this way earlier, in *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2019).

49. *Gundy*, 139 S. Ct. at 2131, 2136 (2019) (Gorsuch, J., dissenting).

50. *Id.* at 2131 (Alito, J., concurring).

Kavanaugh and Coney Barrett to the Court after this decision makes that reconsideration a real possibility,⁵¹ and the Court's fall 2021 acceptance of certiorari in the Clean Air Act cases makes it a stronger likelihood.⁵²

2. What Does It All Mean?

Hostility to regulation and bureaucracy has been a growing and powerful impulse in conservative legal thought,⁵³ one exemplified by today's conservative Supreme Court. As Gillian Metzger lamented even before the *Gundy* decision, there is an obvious and growing "anti-administrativism" among conservative jurists and legal scholars, one she ascribes to the influence of public-choice scholarship on conservative judicial appointees.⁵⁴ How will this anti-delegation sentiment manifest? Will the Court limit the *Gundy* principle to delegations involving criminal liability? Will it craft some form of return to the requirement of an intelligible principle in the delegating language? Will it combine traditional nondelegation analysis with the Major Questions Doctrine in some way? Will it create an entirely new delegation test altogether?⁵⁵

Certainly, the nullification of all delegations pertaining to major questions, or all broad delegations of decision-making discretion, would fundamentally change regulatory governance in disruptive ways.⁵⁶ Some scholars (citing Justice Kavanaugh's prior opinions) believe that the Court may enforce a strong version of the Major Questions Doctrine, rejecting delegations of all consequential decisions to agencies.⁵⁷ Other scholars foresee only incremental changes in the standards of judicial review of agency action. Cass Sunstein has defended the

51. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring, and expressing an openness to a new Nondelegation Doctrine).

52. See *supra* note 1.

53. The scholarly attack on the exercise of delegated policymaking is longstanding, and the literature too large to summarize here. Some examples of work by leading proponents of this view include PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014); David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL'Y 213 (2019); RICHARD EPSTEIN, *THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW* (2020); and Gary Larson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994). For a critical summary, see Jack M. Beerman, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599 (2018).

54. Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. ONLINE 1 (2017), <https://harvardlawreview.org/2017/11/1930s-redux-the-administrative-state-under-siege/> [<https://perma.cc/59EZ-NRJZ>]. For a detailed breakdown of why economics' disciplinary norms lead economists to distrust government, see David B. Spence, *Naïve Energy Markets*, 92 NOTRE DAME L. REV. 973, 986-95 (2017). For a critical review of the legal scholarship supporting the narrowing of agency discretion as a violation of the separation of powers, see Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455 (2020).

55. One commentator has argued for different delegation analyses for different types of actions. Cody Ray Milner, *Into the Multiverse: Replacing the Intelligible Principle Standard with a Modern Multi-Theory of Nondelegation*, 28 GEO. MASON L. REV. 395 (2020).

56. See, e.g., Johnathan Hall, *The Gorsuch Test: Gundy v. United States, Limiting the Administrative State, and the Future of Nondelegation*, 70 DUKE L.J. 175 (2020) (calling Justice Gorsuch's analysis in *Gundy* destabilizing, obscure and unmanageable).

57. Jonathan Skinner-Thompson, *Administrative Law's Extraordinary Cases*, 30 DUKE ENV'T L. & POL'Y F. 293 (2020).

use of the Major Questions Doctrine to require cost justification for new rules and to police agency attempts to expand their own authority, but not its broader use; he sees this narrow version of the doctrine as the new “nondelegation canon.”⁵⁸ Cary Coglianese argues that the doctrine ought to invalidate only delegations of both decision-making discretion and power in ways that “approximate one of Congress’s enumerated powers.”⁵⁹ Many others see futility in attempting to devise any bright line test.⁶⁰ Some recognize this futility but remain troubled by the use of old statutes to address new problems, and so urge Congress to “return to passing laws on a regular basis.”⁶¹ But that is much easier said than done.

B. Two Old Statutes, and a New Climate Challenge

This uncertainty about statutory authority puts regulators in a bind, including regulators like the EPA and FERC whose subject matter jurisdiction places the climate challenge squarely in the middle of their agendas. The question of whether these agencies can use existing statutory authority to hasten the path to net zero carbon emissions is a vitally important one. The world is already experiencing serious adverse effects from climate change, and much worse is yet to come if atmospheric carbon levels cannot be stabilized and then reduced. Getting to net zero⁶² carbon emissions quickly (within a few decades) is necessary to avert damages whose value in human lives, human health and economic costs is difficult to accept.⁶³ Even *The Economist*, whose editors once indulged prominent climate science denier Bjorn Lomborg,⁶⁴ recently concluded that such costs would be “alarming” and would “wipe out the livelihoods of millions.”⁶⁵

58. Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181 (2018).

59. Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1851 (2019).

60. See, e.g., Andrew Coan, *Eight Futures of the Nondelegation Doctrine*, 2020 WISC. L. REV. 141 (2020); J. Benton Heath, *From the Spirit of the Federalist Papers to the End of Legitimacy: Reflections on Gundy v. United States*, 114 NW. U. L. REV. 1723 (2020) (predicting the emergence of “warring visions of the administrative state,” none successfully claiming legitimacy).

61. Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1937 (2020) (urging congressional revival of “the practice of regular reauthorization of statutes that govern federal regulatory action.”). The reasons this is much easier said than done are explained in Part II *infra*.

62. The 2015 Paris Agreement is generally credited with establishing the goal of bringing economies to “net zero” carbon emissions by 2050. This has become a widely embraced goal in the policy literature.

63. For a good exploration of the breadth and seriousness of those damages, and how they will transform the law regardless of whether we enact policies to mitigate the effects of climate change now, see Eric Biber, *Law in the Anthropocene Epoch*, 106 GEO. L.J. 1 (2017).

64. In 2001, *The Economist* offered Lomborg a platform to spread a critique of climate science that was widely discredited at the time, and subsequently rejected by the magazine as well. See Bjorn Lomborg, *The Truth About the Environment*, *ECONOMIST* (Aug. 4, 2001), <https://www.economist.com/science-and-technology/2001/08/02/the-truth-about-the-environment> [https://perma.cc/65LS-XH4B].

65. See *Burning Down the House*, *ECONOMIST* (July 24, 2021), <https://www.economist.com/finance-and-economics/2009/03/05/burning-down-the-house> [https://perma.cc/4UAW-M6WH].

The scope of agencies' administrative discretion to address climate change is all the more important because Congress is extremely unlikely resolve it. While cross-party *voter* support for action to combat climate change has grown to high levels,⁶⁶ the same cannot be said for congressional *leaders*. To the contrary, Republicans and a few coal state Democrats have repeatedly thwarted efforts to enact climate legislation. The House of Representatives passed legislation regulating greenhouse gas emissions in 2009,⁶⁷ but that bill never commanded enough support to be brought to a vote in the Senate.⁶⁸ In the ensuing years, partisan polarization and tribalism have grown at an alarming rate,⁶⁹ and climate legislation has been one of the issues at the heart of the congressional partisan divide. Today, congressional Democrats overwhelmingly support the goal of legislating toward a net zero emission future, while Republicans overwhelmingly oppose it.⁷⁰ The Obama administration's efforts to use existing Clean Air Act authority to regulate greenhouse gas emissions from the electric power sector—its Clean Power Plan⁷¹—provoked opposition from Republicans, some of whom featured opposition to the Clean Power Plan in their election campaigns.⁷² Republican governors and attorneys general sued to overturn the rule,⁷³ while congressional Republicans sought the same goal (unsuccessfully) via legislation.⁷⁴ In the intervening years, Republican control of one or more houses of Congress and/or the presidency kept greenhouse gas emissions limits off the national legislative agenda, until the 117th Congress. In 2021, Congress enacted a bipartisan infrastructure bill that would nibble at the edges of the

66. See *supra* note 10 for recent polling data on this question.

67. This legislation, known as the Waxman-Markey bill, would have established a cap-and-trade system for carbon emissions. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

68. For an account of the congressional politics that doomed Waxman-Markey in the Senate (called Kerry-Boxer there), see Daniel J. Weiss, *Anatomy of a Senate Climate Bill Death*, CTR. FOR AM. PROGRESS (Oct. 12, 2010), <https://www.americanprogress.org/issues/green/news/2010/10/12/8569/anatomy-of-a-senate-climate-bill-death/> [https://perma.cc/PL85-XKDY].

69. For documentation of polarization and partisan acrimony in public opinion, see *infra* note 126, and notes 169-176 and accompanying text. For a primer on how polarization begets congressional gridlock, see, for example, Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 8-16 (2014), (summarizing the academic literature on the causes of partisan polarization and why it prevents Congress from enacting laws that represent majority preferences).

70. Zoya Teirstein, *The Partisan Gap on Climate Change Is Widening*, GRIST (Apr. 13, 2021), <https://grist.org/politics/poll-the-partisan-gap-on-climate-change-is-widening/> [https://perma.cc/WGT9-UUG6] (confirming the partisan divide on this issue, but noting that “Republicans ages 18 to 29 have a more moderate view” of the issue than their leaders).

71. Environmental Protection Agency, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

72. Nick Wing, *Joe Manchin Shoots Cap-And-Trade Bill with Rifle in New Ad*, HUFF. POST (Dec. 6, 2017), https://www.huffpost.com/entry/joe-manchin-ad-dead-aim_n_758457 [https://perma.cc/GJ45-W3ZP].

73. For an analysis of the role of party politics in litigation against the Clean Power Plan, see David E. Adelman & David B. Spence, *Ideology vs. Interest Group Politics in U.S. Energy Policy*, 95 N.C. L. REV. 339, 401-10 (2017).

74. In the years between the failure of the Waxman-Markey bill and the so-called “blue wave” election of 2018, Democrats sponsored more than 25 bills aimed at reducing greenhouse gas emissions. A database of those bills is on file with the author.

problem.⁷⁵ That same year, the House passed a version President Biden’s “Build Back Better” legislation without Republican support, and only after its sponsors removed provisions establishing a clean energy standard in the electricity sector that were opposed by Democrat Joe Manchin in the evenly-divided senate.⁷⁶ However, as of this writing, the Senate has not taken up that bill and seems unlikely to do so; meanwhile, congressional proponents of greenhouse gas regulation are assessing whether they can muster the votes to pass weaker, piecemeal climate bills outside of the “Build Back Better” framework.

Even though a rapid energy transition is a political nonstarter for congressional Republicans, it remains true that getting to net zero by mid-century will require a national policy push. Therefore, when the EPA and FERC are inclined to address this problem (under Democratic Party presidents), they will have to do so using authority conferred by the Clean Air Act and the Federal Power Act, statutes drafted many decades ago. As explained in this Section, there is a reasonable argument that this task is within the existing remit of both agencies, but that argument seems more vulnerable if we scrutinize these agencies’ enabling laws from the point of view of a skeptical Supreme Court. And if the Court decides that Congress must make all the significant decisions about a transition to a net zero future, that decision will represent both a historic departure from its delegation jurisprudence, and a death knell for bold national action to address the climate emergency for the foreseeable future.

In this section I first explore how skeptical federal courts could apply traditional *Chevron* review to the use of the Clean Air Act and Federal Power Act, respectively, to facilitate rapid greenhouse gas emissions reductions; I then explore briefly the fate of such efforts under a stricter, yet-to-be-articulated Major Questions/Nondelegation review.

1. Scrutinizing Use of the Clean Air Act to Limit Greenhouse Gas Emissions

The litigation that challenged the Obama Administration’s Clean Power Plan⁷⁷ had not run its course by the time the Trump administration took office. The Trump EPA rescinded the rules comprising the Clean Power Plan,⁷⁸ and the

75. The Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021). The law does not mandate greenhouse gas emissions reductions, but does support clean energy by, among other things, expanding tax credits for renewable energy and strengthening federal authority to site transmission infrastructure necessary to support wind and solar power plants.

76. Build Back Better Act, H.R. 5376, 117th Cong. (2021). As of this writing, the bill retains its provisions mandating reduced methane emissions from oil and gas operations and providing federal funding for electric vehicle charging infrastructure.

77. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

78. The Trump EPA replaced the Clean Power Plan with its own Affordable Clean Energy Plan, which imposed little to no emission reduction obligation on existing plants. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (Sept. 6, 2019) (to be codified at 40 C.F.R. pt. 60).

Biden Administration has not proposed to reinstate it. Nevertheless, the Supreme Court has taken up the question of whether the Clean Air Act would have authorized the Clean Power Plan. The EPA can offer a credible argument that the Clean Air Act authorizes it to impose meaningful greenhouse gas limits on the American energy sector under either of two approaches: (1) by establishing national ambient air quality standards (NAAQS) for greenhouse gases as a so-called “criteria” pollutant under Sections 108 and 109 of the statute,⁷⁹ thereby triggering state obligations to take action to attain or maintain compliance with the NAAQS⁸⁰; or (2) by establishing sector-specific emissions limits using Section 111(d),⁸¹ the provision upon which the Obama EPA relied when propagating the Clean Power Plan.⁸² However, the case for regulatory authority under each of these statutory provisions is complex and somewhat awkward, exposing their vulnerability to a federal judiciary growing hostile to the exercise of administrative discretion.⁸³

If the EPA were to establish a NAAQS for greenhouse gases, the first step in that statutorily-prescribed process would be to list greenhouse gases as a criteria pollutant,⁸⁴ after which it would look to the Clean Air Scientific Advisory Committee to recommend a range of safe concentrations in the ambient air.⁸⁵ Given that information, the EPA would then promulgate primary and secondary ambient air quality standards: the former must be set at a level necessary to “protect public health with an adequate margin of safety,”⁸⁶ and the latter to protect “public welfare.”⁸⁷ Interestingly, the statutory definition of “public welfare” refers specifically to effects on the climate, and on crops, weather, water, and more.⁸⁸ Nothing in these provisions seems to explicitly preclude establishment of a greenhouse gas NAAQS. All of which suggests that a NAAQS for greenhouse gases ought to pass *Chevron* Step One, and that perhaps *Chevron* Step Two ought not to be a hurdle either.⁸⁹

79. 42 U.S.C. §§ 7408 (2018) (defining criteria pollutants and authorizing establishment of NAAQS) and 7409 (establishing standard governing the EPA’s setting of NAAQS).

80. 42 U.S.C. § 7410 (2018) (requiring states to draft and secure EPA approval of plans to implement NAAQS compliance).

81. 42 U.S.C. § 7411(d) (2018).

82. Only this latter approach is under review in the West Virginia cases, though the Court could articulate constitutional limits on delegation that negate both approaches.

83. The Clean Air Act establishes as separate, mostly federal regime for so-called “hazardous” or “toxic” pollutants under Section 112 of the statute. 42 U.S.C. § 7412 (2018). There is little or no expectation that the EPA would try to use this part of the statute to regulate greenhouse gases.

84. Criteria pollutants are those which the EPA has adjudged to “endanger public health or welfare . . . the presence of which in the ambient air results from numerous or diverse mobile or stationary sources” 42 U.S.C. § 7408(a)(1) (2018).

85. 42 U.S.C. § 7408(b)-(c) (2018).

86. 42 U.S.C. § 7409(a) (2018).

87. 42 U.S.C. § 7409(b) (2018).

88. 42 U.S.C. § 7602(h) (2018).

89. For scholarship advocating a NAAQS-based regulation of greenhouse gases, see, for example, Howard M. Crystal, Kassie Siegel, Maya Golden-Krasner & Clare Lakewood, *Returning to Clean Air Act Fundamentals: A Renewed Call to Regulate Greenhouse Gases Under the National Ambient Air Quality Standards Program*, 31 GEO. ENV’T L. REV. 233 (2019).

However, to a more skeptical eye, greenhouse gases may seem to fit this regulatory regime a bit too awkwardly. The statute appears to contemplate the establishment of both primary and secondary NAAQS for any criteria pollutant,⁹⁰ and the primary NAAQS is required to be set so as to “protect public health with an adequate margin of safety.”⁹¹ While it is not difficult to argue that greenhouse-gas emissions endanger public health, all of the extant NAAQS involve pollutants the direct inhalation or ingestion of which can pose health harms to human beings. The statutory standards for setting NAAQS do not require a showing of *direct* harm, but Congress seems to have been concerned about that kind of harm from pollutants (like lead, carbon monoxide, or airborne particles) when it drafted Sections 108 and 109 of the statute.⁹² By contrast, humans experience no direct harm when they inhale and exhale the most common greenhouse gas, carbon dioxide, with each breath. On the other hand, some criteria pollutants—specifically sulfur dioxide and oxides of nitrogen—only pose direct harm to humans if inhaled at very high concentrations (which would also be true of carbon dioxide), concentrations unlikely to be encountered by people in the ambient air today. Instead, regulation of these pollutants is driven more by concern over their indirect effects as precursors of acid rain or ozone, respectively. And one might argue further that because the statute contains another, separate regime for regulating more acutely dangerous toxic pollutants,⁹³ the NAAQS regime can accommodate pollutants like greenhouse gases that pose less direct, less acute risks to human health.

But there is another “fit” problem with the NAAQS-based approach. Once the EPA promulgates a NAAQS, the statute directs states to develop plans to reduce the ambient concentrations of greenhouse gases within their borders, typically through a variety of regulatory measures designed to reduce emissions from in-state emitters.⁹⁴ However, because greenhouse gases mix more thoroughly in the atmosphere than other pollutants, and ambient concentrations of greenhouse gases are roughly similar worldwide, nothing an individual state can do will have an appreciable influence on the concentration of greenhouse gases within its borders, regardless of the control measures it institutes. Its state plan will have no appreciable effect on ambient concentrations of the pollutant. This fact seems to undermine the very purpose of state plans, suggesting that greenhouse gases are not the kind of pollutant that fit the NAAQS regime. One can imagine the Supreme Court’s likening this approach to the rule it faced in *UARG* and concluding that the statutory regime for setting and complying with

90. 42 U.S.C. § 7409(a)(1)(a) (2018) (the agency “shall . . . prescribe[e] a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant”).

91. 42 U.S.C. § 7409(b)(1) (2018).

92. 42 U.S.C. §§ 7408, 7409 (2018).

93. See discussion of Section 112, 42 U.S.C. § 7412 (2018), *supra* note 83.

94. The process for developing and securing EPA approval of these plans is outlined in Section 110 of the statute, 42 U.S.C. § 7410 (2018).

NAAQS suggests that greenhouse gases do not fit the definition of criteria pollutants (even if they fit the “Act-wide” definition of “pollutant”).⁹⁵

On the other hand, some of the other criteria pollutants travel across state or national borders, undermining states’ efforts to comply with NAAQS. The statute foresees this problem and authorizes the EPA to address it by imposing limits on upwind sources and/or applying leniency to noncompliant downwind states.⁹⁶ But arguably, there are no other NAAQS, compliance with which is beyond the EPA’s power to elicit *everywhere* in the United States, as would be the case with greenhouse gases. And when faced with reviewing these cross-border pollution problems, the federal judiciary has tended to scrutinize the EPA’s imposition of emissions limitations on upwind sources in these cross-border cases, insisting that those limits be tied closely to their downwind effects.⁹⁷ It could not do so in the context of compliance with a greenhouse gases NAAQS because most of the contributors to noncompliance would be beyond the agency’s jurisdiction. This difference appears to offer judges (who are so inclined) a *Chevron* step two opportunity to reverse a NAAQS-based approach to limiting greenhouse gas emissions as beyond the agency’s discretion.

Skeptical judges might find similar opportunities when reviewing regulation under Section 111(d) of the Clean Air Act. As an initial matter, one can understand why the Obama EPA relied upon Section 111(d). It reads as a sort of catchall authority for the EPA to regulate pollutants or sources of pollution that don’t fit neatly into other parts of the statute. Section 111(d) authorizes the EPA to establish guidelines according to which states establish standards of performance for existing sources of pollutants.⁹⁸ The statute requires standards of performance to reflect the “best system of emission reduction . . . [that has been] adequately demonstrated” (BSER), considering costs.⁹⁹ The statute defines “existing source” as a stationary source, which is defined as any “building, structure facility, or installation” that emits the pollutant.¹⁰⁰ If that definition implies that states must create standards applicable to individual stationary sources (as it has done for most of its new source standards under the statute), this makes the objective of requiring sharp reductions in greenhouse gas emissions more difficult, because the only way to make significant greenhouse gas emission reductions from fossil-fueled power plants is by installing carbon capture and storage (CCS) technology. The technical feasibility of CCS has been demonstrated, but installing CCS is cost-prohibitive in competitive electricity markets. Are standards that require CCS on fossil-fueled power plants

95. Util. Air Reg’l Grp. v. EPA, 573 U.S. 302, 316 (2014).

96. See 42 U.S.C. §§ 7415 (establishing a process for addressing pollution crossing international borders) and 7426 (establishing a process for addressing pollution crossing state borders).

97. See EPA v. EME Homer Generation, L.P., 572 U.S. 489 (2014) (scrutinizing, and ultimately approving, the causal connections between emission and downwind NAAQS noncompliance in connection with ozone precursors).

98. 42 U.S.C. § 7411(d)(1) (2018) (the EPA “shall prescribe regulations . . . under which each State shall . . . establish[] standards of performance for any existing source”).

99. 42 U.S.C. § 7411(a)(1) (2018).

100. 42 U.S.C. § 7411(a)(6), (3) (2018).

“adequately demonstrated . . . considering costs”? If the term “costs” includes only the costs borne by the regulated entity, perhaps not; if the term includes social costs, maybe so.

However, the Obama Administration argued that standards of performance under Section 111(d) do not necessarily apply only to individual plants, but rather that the statute could be interpreted such that standards apply to systems of emitters that operate in coordination with one another—as do power plants on the electric grid. Grid operators dispatch power plants according to well-defined rules,¹⁰¹ ordering plants to turn on and off, or to ramp their production up and down, over the course of the day. Under this reading of the statute, significant emissions reductions can be accomplished by establishing standards for the *system* rather than for each individual plant; this approach would be much less costly and better demonstrated than installing CCS on a fossil-fueled plant, because inexpensive, clean sources of power could be used in place of fossil generators rather than installing expensive CCS on those plants.

But there are “bad fit” rejoinders to this argument as well. First, the statute charges *states* with establishing standards of performance for sources, but the power grid is operated *regionally*, in ways that cross state boundaries.¹⁰² States exert varying levels of regulatory control over the individual utilities that own infrastructure within their boundaries;¹⁰³ for much of the country states no longer set the revenues earned by owners of electric generators.¹⁰⁴ Thus, the cost and environmental impacts of any state-wide standard will be very different in states with traditional public utility regulation than in states with competitive wholesale markets. In the former, utilities can pass on to their ratepayers the losses associated with reduced use of fossil fueled generators; in the latter, owners of fossil fuel generators will bear those costs directly. When Section 111(d) was drafted, the consequences of a more expansive definition of “standard of performance” would not have differed geographically in this way. How will these arguments be received by a skeptical federal court applying the modern version of *Chevron* deference? As of this writing, we do not know.

There is yet another potential hurdle associated with the use of Section 111(d) to regulate greenhouse gases. The most recent version of that section was the product of an amendment process that included a legislative drafting error: that is, in the 1990 amendments to the statute the House of Representatives approved one version of this section,¹⁰⁵ and the Senate another.¹⁰⁶ Interestingly, the conference committee never resolved the difference between the two bills.

101. These rules are sometimes called “security constrained economic dispatch,” or “SCED.” This dispatch procedure favors reliability of supply and minimizing the marginal costs of supplying electricity at all times.

102. 42 U.S.C. § 7411(d) (2018).

103. For a description of the surprisingly varying federal institutional structures governing electricity markets, see Adelman & Spence, *supra* note 73, at 364-75.

104. *Id.*

105. Pub. L. No. 101-549 § 108(g), 104 Stat. 2399, 2467 (1990)

106. Pub. L. No. 101-549 § 302(a), 104 Stat. 2399, 2574 (1990).

Nonetheless, the House version was printed in the U.S. Code, and that language appears to prohibit the use of Section 111(d) to regulate any *source* whose toxic pollutants are regulated under Section 112 of the Act. Since mercury emissions from coal fired power plants are regulated under Section 112, that version of Section 111(d) seems to prohibit its use to regulate any other pollutants (including greenhouse gases) emitted from coal-fired power plants. This seems a nonsensical result, and indeed there are good reasons to believe that Congress did not intend it,¹⁰⁷ including language in the Senate bill implying a congressional intent to prevent the regulation of *emissions*—not *sources*—under multiple parts of the statute.¹⁰⁸ Regardless, this drafting error offers yet another basis on which to challenge the use Section 111(d) to impose meaningful greenhouse gas emissions from the power sector.

Thus, while one can make a compelling case that the EPA may regulate greenhouse gas emissions under either the NAAQS or 111(d) regimes under the Clean Air Act, neither regime is as clean a fit as proponents of emissions limits would like even applying traditional *Chevron* deference. And that question seems likely to be rendered moot if, as expected, the Supreme Court embraces a more demanding standard of review in 2022.

2. Scrutinizing Use of the Federal Power Act to Limit Greenhouse Gas Emissions

The Clean Air Act presents the EPA with the challenge of fitting a new problem, greenhouse gas emissions, into specific statutory language that was drafted before Congress was aware of the magnitude and nature of the climate challenge. The Federal Power Act poses a different interpretive challenge: it delegates extremely broad discretion to the FERC to manage wholesale power markets and the transmission grid. There is no finely-articulated regime into which the agency must try to squeeze a solution. Rather, the statute directs the agency simply to ensure that wholesale rates for these electricity services remain “just and reasonable” and nondiscriminatory, and empowers the agency to remedy situations in which those standards are violated.¹⁰⁹ The FERC employed this authority during the Obama Administration when it promulgated rules designed to hasten the transition to lower carbon electricity by lowering barriers

107. The pre-amendment version of Section 111(d) prohibited use of the section to regulate “any air pollutant . . . which is not on a list published under . . . Section 112 . . .”. 42 U.S.C. § 7411(d)(1) (1988).

108. For a description of the drafting error and its effects, see Kate Konschnik, *EPA’s 111(d) Authority—Follow Homer and Avoid the Sirens*, LEGAL PLANET (May 28, 2014), <https://legal-planet.org/2014/05/28/guest-blogger-kate-konschnik-epas-111d-authority-follow-homer-and-avoid-the-sirens/> [https://perma.cc/5G5A-4WAP]. For an application of the Scrivener’s Error interpretive canon to this issue, see Ryan D. Doerfer, *The Scrivener’s Error*, 110 NW. U. L. REV. 811, 855-56 (2016).

109. Section 205 of the statute imposes the requirement that rates be just and reasonable. 16 U.S.C. § 824d (2018). Section 206 of the statute authorizes the agency to remedy “practices affecting” rates that caused them to become unjust, unreasonable or discriminatory. 16 U.S.C. § 824e (2018).

to participation in electricity markets for wind and solar generators,¹¹⁰ providers of demand response services,¹¹¹ and owners of electricity storage resources.¹¹² Those FERC rules have largely survived intact, but the FERC has stopped short of using its existing statutory authority to take more drastic action, such as requiring carbon pricing in wholesale electricity markets.

Of course, what is “just or reasonable” is in the eye of the beholder. Traditionally, in the electric utility industry, the language has been used to ensure that rates for electricity and transmission services remain within a zone of reasonableness that neither exploits captive customers nor confiscates shareholders’ assets.¹¹³ FERC’s focus has been on ensuring reliable service at least cost. However, in the face of a climate emergency to which the electricity sector has contributed significantly, commentators have argued that this standard ought to take account of the environmental impacts of electricity generation, and that rates that do not reflect the full social costs of electricity.¹¹⁴ That is, such rates omit the costs imposed by carbon emissions, and are therefore unjust and unreasonable, and discriminatory. FERC has been reluctant to require that kind of social cost pricing, perhaps doubting its statutory authority to do so.¹¹⁵ However, recently it has signaled its willingness to consider allowing a regional market—the New York state wholesale market—to do so.¹¹⁶

There is nothing in the Federal Power Act that explicitly prohibits this broader reading of the statute. It seems unlikely to fail *Chevron* Step One, but what about *Chevron* Step Two? One can argue that the context in which the statute was written (in 1935), and the subsequent jurisprudence interpreting the “just and reasonable” language, all point toward a narrower focus on cost and reliability alone. The “just and reasonable” standard predates widespread concern about climate change. Moreover, as concerns about the environment have arisen, Congress has addressed them separately by enacting other laws—national pollution control statutes like the Clean Air Act—perhaps implying a

110. This rule is known as FERC Order No. 764. Integration of Variable Energy Resources, 139 FERC ¶ 61,246 (2012).

111. This rule is known as FERC Order No. 745. Demand Response Compensation in Organized Markets, 134 FERC ¶ 61,187 (2011).

112. This rule is known as FERC Order No. 841. Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators; Electric Storage Participation in Regions with Organized Wholesale Electric Markets, 162 FERC ¶ 61,127 (2018).

113. See generally *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944) (laying out the version of this standard that has persisted to the present day).

114. See, e.g., Todd S. Aagaard, *Energy-Environment Policy Alignments*, 90 WASH. L. REV. 1517 (2015); Joel B. Eisen, *FERC’s Expansive Authority to Transform the Electric Grid*, U.C. DAVIS L. REV. 1783 (2016).

115. The D.C. Circuit cast doubt on this authority in dicta in *Grand Council of the Crees v. Fed. Energy Reg’l Comm’n*, 198 F.3d 950 (D.C. Cir. 2000) (holding that certain environmental interests are not within the zone of interests protected by the National Environmental Policy Act “as applied to” the just and reasonable rate requirement under the Federal Power Act).

116. See *Carbon Pricing in Wholesale Markets*, 175 FERC ¶ 61,036 (2021) (signaling a willingness, under certain conditions, to permit carbon pricing in wholesale markets). For a fuller discussion of the FERC’s authority to permit or require carbon adders, see Eisen, *supra* note 114, at 1834-43.

preference for addressing these kinds of problems outside the Federal Power Act regime.

On the other hand, the courts have tolerated other changes in the way the “just and reasonable” standard has been applied over time, changes that are at least as drastic as adopting social cost pricing for electricity. Over the last 50 years FERC has drastically restructured wholesale electricity markets, forcing the functional separation of transmission services from wholesale power sales, introducing competition into the generation sector, and authorizing the replacement of administratively-set rates with market prices for wholesale power services across much of the country.¹¹⁷ The magnitude of these changes cannot be overstated; electric utility regulation looks fundamentally different today than it did 50 years ago, and all of these changes were accomplished without Congress amending the “just and reasonable” standard. One might reasonably claim, therefore, that if the statute is elastic enough to subsume these changes, it can authorize the social-cost pricing of wholesale power.¹¹⁸

Furthermore, there is precedent for the idea that broad delegations of authority empower the regulator to consider all the important dimensions of regulated activity. Indeed, this idea was at the heart of the so-called “hard look” cases of the 1960s and 70s, which imposed duties on agencies to interpret their existing statutory authority broadly to address problems Congress was ignoring. In one such case involving the hydroelectric licensing provisions of the Federal Power Act, *Scenic Hudson Pres. Conf. v. FPC*,¹¹⁹ the Second Circuit interpreted another broad provision of the Federal Power Act¹²⁰ to impose a duty upon the agency to consider certain environmental dimensions of a regulatory decision not expressly enumerated in the statutory language. Said the court

In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for the adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.¹²¹

Thus, there is at least a colorable argument that the statutory language of the Federal Power Act authorizes the FERC to mandate carbon pricing in

117. See FERC Order No. 888, Promoting Wholesale Competition Through Open Access, Nondiscriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 75 FERC ¶ 61,080 (1996); *New York v. Fed. Energy Reg’l Comm’n*, 535 U.S. 1 (2002) (upholding the shift to competition and market pricing in wholesale power markets).

118. Technically, the Supreme Court has never decided whether these changes in the structure and pricing of wholesale power and transmission services are consistent with the just and reasonable standard. *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 538 (2008) (“We have not hitherto approved, and express no opinion today, on the lawfulness of the market-based-tariff system . . .”). Interestingly, in one of the earliest decisions invoking the Major Questions Doctrine, the Court disapproved the Federal Communication Commission’s transition from regulated to market-based rates under very similar statutory authority as that conferred in the Federal Power Act. See *MCI Telecommunications Corp.*, 512 U.S. 218, 218 (1994).

119. *Scenic Hudson Pres. Conference v. Fed. Power Comm’n*, 354 F.2d 608 (2d Cir. 1965).

120. *Id.* at 611.

121. *Id.* at 620.

wholesale power markets. If the FERC were to conclude that the omission of social costs from wholesale power prices makes those prices unjust and unreasonable, and were to therefore mandate their inclusion, it would be exercising its authority in ways not dissimilar to what it has done in the past.

3. These Statutes Delegate Policymaking Decisions About a Major Question

Of course, colorable arguments based upon statutory language may survive traditional *Chevron* review without surviving a Major Questions/Nondelegation Doctrine analysis. Even under the traditional Nondelegation Doctrine's intelligible principle test, the use of social-cost pricing under Federal Power Act's "just and reasonable" standard may be vulnerable to reversal in court. Apart from what can be gleaned from the historical context, Congress did not define (statutorily) what factors or criteria the FERC ought to consider when internalizing the environmental costs of power generation. And anticipating the Supreme Court's embrace of some sort of Major Questions limitation on the exercise of delegated discretion, the prospects for bold executive branch climate policy grow dimmer. If we step back from the particulars of both of these statutes and put aside how they have been interpreted in the past, it seems evident that both delegate to the executive branch the power to make important, consequential policy choices. And it seems equally evident that any attempt to use them to hasten a transition to net zero economy by 2050 would represent one such choice. Unfortunately for climate policy advocates, the Supreme Court may be on the cusp of requiring that Congress make these kinds of choices.¹²²

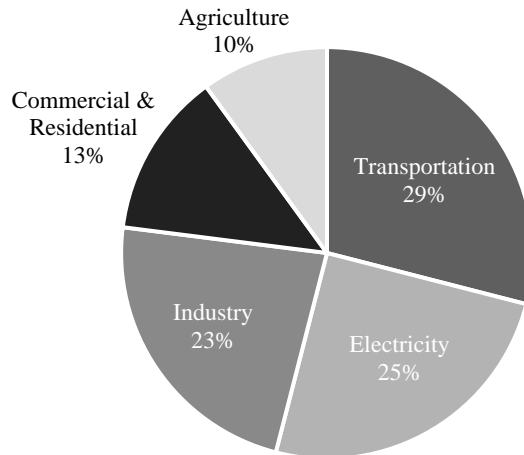
Indeed, it is difficult to overstate how pervasive carbon emissions are throughout the American economy. As illustrated in Figure 1, bringing net emissions to zero in the space of a few decades implicates not only the electricity-generation sector and the transportation sector (where relatively affordable alternatives to fossil fuel combustion are most readily available), but also the manufacturing sector (fossil fuels used as raw materials), the buildings sector (fossil fuels used for heating and cooking), and the agricultural sector (biomethane emissions). Removing these emissions or capturing and sequestering them will require root-and-branch changes in the way economic activity is undertaken in significant parts of each of these sectors. The transition to a net zero economy does not represent a Pareto improvement, not by a long shot;¹²³ there will be big winners and big losers. Nor can these changes be

122. Two of the questions the Court has taken up in the West Virginia cases, *supra* note 1, concern this decision magnitude issue. One asks whether an "ancillary provision" of the Clean Air Act like Section 111(d) may be used to "reshap[e] the nation's electricity grids and unilaterally decarbonize[e] virtually any sector of the economy." Another asks whether the same statutory section authorizes the EPA to "decide such matters of vast economic and political significance as whether and how to restructure the nation's energy system."

123. The Pareto criterion comes from welfare economics, and offers one possible way of evaluating the social desirability of a change in the status quo. A policy change is only "Pareto superior"

effected through incentives alone; by any reasonable measure, this transformation will be very “significant,” both economically and politically.

Figure 1: Sources of Greenhouse Gas Emissions in the American Economy, 2019¹²⁴



Nevertheless, in the face of congressional paralysis, responsible regulators will try to use existing statutes to address the climate emergency. They will defend their actions in court by focusing on the ways in which Congress seemed to build flexibility into those statutes, or by characterizing new initiatives as incremental deviations from standard practice under the regulatory regime. While many judges may have embraced these formerly colorable arguments in the interests of good governance, today’s Supreme Court very likely will not (something that may be confirmed by the time this article is published). Indeed, as we try to anticipate what a Major Questions/Nondelegation standard of judicial review looks like, arguments based on existing statutory authority start to look more and more vulnerable. That is unfortunate, because the result will be to take decision-making responsibility away from those best equipped to study and solve complex, high-stakes problems like the climate emergency: namely, agency experts insulated from direct partisan political pressure. It will instead hand those complex choices to an institution (Congress) that is poorly-equipped to make them in the best of times, and hopelessly unable to do so at this historic moment. If the Court requires that Congress must make all politically and economically significant choices about climate policy and the attendant energy

to the status quo if some are better off, and none are worse off, after the change. See *Pareto Principle*, INVESTOPEDIA (Apr. 7, 2022), www.investopedia.com/terms/p/paretoprinciple.asp [<https://perma.cc/ZQH5-7XB5>].

124. This figure is adapted from a similar figure produced by the EPA. EPA (2019), <https://www.epa.gov/sites/default/files/styles/medium/public/2021-04/total-ghg-2021.png?VersionId=y.PqtHWKDbtdXhQojNy8QTxw.xlWgc8&itok=27aJ-HKQ> [<https://perma.cc/TB4C-ELBY>].

transition, it has put Americans in a very difficult spot. Part II explains why Congress will not and cannot make these choices; Part III explains why the Court has erred in believing that it must do so.

II. Complexity, Tradeoffs and Legislating in the Age of Partisan Tribalism

If the Supreme Court is moving toward a model of modern administrative law that reserves all important policy choices to Congress, that poses a problem not only for the use of existing statutes to address important national problems, but also for the crafting of constitutionally-permissible responses to those problems in the future. That choice could be characterized fairly as some sort of new Nondelegation Doctrine. There are good reasons why the Nondelegation Doctrine has remained “toothless”¹²⁵ for most of its existence. Congress cannot and ought not to define all of the important contours of the boundary between government and markets, particularly when it comes to policy problems characterized by extremely high levels of complexity and uncertainty.

Congress makes policy when it empowers regulators to intervene toward specified *ends*, establishing the goals of regulation but letting regulators establish the *means* to those ends. It is especially naïve to expect Congress to decide those “how” questions, especially in the midst rapidly deteriorating cross-party acceptance of the basic, foundational “fair play” norms of partisan conflict. The rise of partisan tribalism means that voters’ issue preferences exert weaker effects on policy outcomes.¹²⁶ For that reason, the Court’s refusal to allow regulators to make consequential policy decisions does not increase the pressure on Congress to do so, because voters will vote the party line regardless. American democracy is simply not amenable to that sort of judicial “tough love” in an era when almost all votes are determined by the voter’s sense of party identity. So it is with climate policy.

Even in the absence of bitter partisan rancor, transitioning to a net zero carbon emission economy by midcentury is a wickedly complex¹²⁷ political task because it asks policymakers to make high-stakes choices now about a future characterized by great technological and economic uncertainty, as well as geographic heterogeneity. The devil is in truly the details, and those details involve judgments about what energy systems will be effective, affordable, and fair in different places and circumstances in the future. Each dimension of that uncertain future is contested by experts and lay people, firms and interest

125. See Adler & Walker, *supra* note 61, at 1933, referring to the Nondelegation Doctrine in this way.

126. See Iyengar et al., *supra* note 13 (polarization is no longer mainly issue-based, but rather has become more closely tied to morality and identity).

127. The term “wicked problems” is most commonly associated with the planning and management disciplines, and refers to problems that are sufficiently multidimensional and complex to be unamenable to identifying a best or optimal solution. For a history of this idea, see Andrejs Skaburskis, *The Origin of “Wicked Problems*, 9 *PLAN. THEORY & PRAC.* 277 (2008).

groups—much of it in social media fora that shape voters’ beliefs into narratives consistent with their partisan identities.¹²⁸

A. Techno-Economic Complexity

All sorts of technologies can help to stabilize carbon concentrations in the atmosphere over the next few decades, including replacing fossil fuels with zero- or low-emission fuels, employing negative emissions technologies that sequester carbon, and changing the way we use energy. We cannot know now what technologies will be scalable, affordable, or otherwise “best” two or three decades into the future. Each technology competes with others in the market, and so proponents of each aim to provide an ever-better product at an ever-lower cost. At the same time, different transition paths entail different (and uncertain) distributions of costs and benefits. It is not simply that employees and shareholders in some industries will gain while others lose, or that reducing carbon emissions will benefit those who otherwise would have borne more of the costs of climate change.¹²⁹ There are other distributional uncertainties as well. For example, which communities will be required to “host” the massive amounts of new energy infrastructure required to make the transition? Who should pay for the out-of-pocket costs of a transition? Will those costs be reflected in higher energy prices, which could disproportionately burden those for whom energy costs are a larger share of their income? Might those costs be instead spread across the tax base, and therefore be distributed more progressively? Layered over the top of these distributional questions are issues of geographic heterogeneity: different regions of the country can make more effective and efficient use of different technologies.¹³⁰ The wind blows and the sun shines better in some places than others; the subsurface geology supports geothermal power or carbon sequestration better in some places than others. And so on. It is in these ways that climate policy is a wicked problem.

Changing the way we generate electricity, how we move about, how we manufacture goods, how we heat and light buildings, and how we raise livestock—each presents its own set of profound challenges. In some of these

128. For the seminal treatment of how social media censor information and distort our understanding of issues and problems, see ELI PARISER, *THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU* (2009).

129. Those beneficiaries of climate mitigation will include rich and poor alike: those who live in flood prone communities, owners of beach property, farmers in newly drought prone areas, people who lie in the path of hurricanes strengthened by warming oceans, and more.

130. For example, generating solar power in Arizona is cheaper than generating solar power in Buffalo, all else equal; generating wind power is cheaper in the Great Plains than it is in less windy places. The question of whether greenhouse-gas regulation represents a transfer of wealth away from some parts of the country, and to others, complicated passage of the Waxman-Markey bill. It may also have played a part in opposition to the Obama Administration’s Clean Power Plan. For a depiction of the renewable resource endowments in different parts of the country, see the *Renewable Energy Atlas*, NAT’L RENEWABLE ENERGY LABORATORY, <https://maps.nrel.gov/re-atlas/?aL=kEU0Ap%255Bv%255D%3Dt%26AMzVXM%255Bv%255D%3Dt%26AMzVXM%255Bd%255D%3D1%26gqexyY%255Bv%255D%3Dt%26gqexyY%255Bd%255D%3D2&bL=clight&cE=0&IR=0&mC=40.21244%2C-91.625976&zL=4> [https://perma.cc/MHN7-FVX6].

settings, there are substitute clean technologies that are ready now. In others clean substitutes seem a long way off. Low- or zero-carbon electric generation options include technologies like wind and solar, geothermal, hydroelectric and nuclear power that emit little-to-no carbon at the generation stage, and carbon capture and storage can sequester those emissions that remain. But making these substitutions affordably and reliably is complicated; getting to a net zero electric grid in Kentucky, for example, is a very different project than it is in New York, and each of those is quite different from getting to net zero in Texas, which differs from California, and so on.¹³¹ Similarly, the transportation future will probably include some combination of electric or hydrogen powered vehicles, increased reliance on mass transit, land use changes, and more; but different states and cities may have strong preferences about what the net zero transportation future ought to look like. The transition in the manufacturing and building sectors is less clear, but must involve some way of designing or retrofitting processes and buildings (respectively) to substitute cleaner energy sources for fossil methane—for example (non-fossil) electricity or hydrogen, ammonia, or renewable methane. For the agricultural sector, the solutions seem even more difficult and farther off, but may involve capturing and using bio-methane, reducing the generation of bio-methane in farming and ranching processes, or even reducing consumer demand for (animal) meat.¹³²

The economic stakes of this transformation for manufacturers, trade associations, and buyers and sellers of energy (as well as homeowners, drivers, and meat-eaters) are huge, as are the ideological stakes for mission-oriented NGOs and politicians. The actual future path to net zero—what gets built, and what gets used—will be determined in large part by economic actors who will invest in the energy sources, products and services that promise the most favorable returns. Buyers, in turn, will purchase the energy, goods and services that are most affordable. In the electricity sector, renewables are already the cheapest form of power production on a levelized-cost basis,¹³³ so market forces

131. For example, according to the Energy Information Administration, the percentage of coal-fired power in the electricity-generation mix for Kentucky, New York, Texas and California is, respectively, 94%, 0%, 18%, and 0%. See *State Profiles and Energy Estimates*, U.S. ENERGY INFO. ADMIN., <https://www.eia.doe.gov/state/> [<https://perma.cc/SZ6H-QTXB>]. These states' endowment of renewable generation potential is similarly varied.

132. Among the various models of a transition to a net zero economy, some explore these difficult issues better than others. For two that do a good job on this metric, see *Net Zero America: Potential Pathways, Infrastructure, and Impacts*, PRINCETON UNIV., <https://netzeroamerica.princeton.edu/> [<https://perma.cc/T4PM-3MFP>]; and *Accelerating Decarbonization in the United States: Technology, Policy and Societal Dimensions*, NAT'L ACADS. OF SCIS. ENG'G MED. (2021), <https://www.nationalacademies.org/our-work/accelerating-decarbonization-in-the-united-states-technology-policy-and-societal-dimensions> [<https://perma.cc/RVL5-DCUF>].

133. That is, if we assume (as is true now in most places) that wind and solar generators can sell all the power they generate over the course of their useful life, wind and solar generators can turn a profit at a lower average power price than gas-fired, coal-fired or nuclear generators. *Levelized Cost of Energy Analysis – Version 13.0*, LAZARD (Nov. 2019), <https://www.lazard.com/media/451086/lazards-levelized-cost-of-energy-version-130-vf.pdf> [<https://perma.cc/N9T9-PDB2>].

are pushing toward decarbonization of that sector.¹³⁴ But in the rest of the economy, low- or zero-carbon substitutes are sometimes considerably more expensive than carbon-based alternatives, at least for now. It remains to be seen how much less expensive these competing technologies (both carbon and zero-carbon) will become, and how fast those cost declines will be. And if history is any guide, the transition to a net zero future will include technologies we may not yet have imagined, as well as sudden changes in technologies and prices that we cannot foresee.

B. Policy Choice Complexity

Policy will shape these transition paths to a net zero future. The policy options¹³⁵ are familiar and include a variety of mandates and economic incentives. The former category would include the kind of prescriptive and proscriptive mandates (supported by permitting and enforcement regimes) that characterize most American environmental law,¹³⁶ as well as state clean-energy standards,¹³⁷ appliance and building codes,¹³⁸ mandates relating to vehicle emissions,¹³⁹ and planning and zoning to promote “urbanization” or other land use designs intended to promote reduced energy consumption.¹⁴⁰ Economic-incentive instruments include: (i) carbon emissions taxes promoted by groups

134. See *infra* Section II.B for an explanation of why inexpensive renewables will not yield a net zero emission electricity sector, on any schedule.

135. The social science and legal literature addressing the regulatory instruments available to reduce atmospheric carbon is very thoroughly plowed ground. It is beyond the scope of this Article to explore that literature, except to recognize a few of the general truths that can be extracted from it.

136. Social scientists and legal scholars sometimes refer to these types of instruments as “command and control” regulation, and often hold up the Clean Air Act as a prototypical example. For examples of critiques of command-and-control regulation by economists, see DAVID W. PEARCE & R. KERRY TURNER, *THE ECONOMICS OF NATURAL RESOURCES AND THE ENVIRONMENT* (1990); and WILLIAM J. BAUMOL & WALLACE E. OATES, *THE THEORY OF ENVIRONMENTAL POLICY* (2d ed., Cambridge Univ. Press 1988).

137. Clean energy standards and renewable portfolio standards mandate that specified percentages of the electricity sold by utilities or other electricity retailers come from renewable or zero-emission sources. A majority of states now have some form of CES or RPS. For up-to-date information about state RPS, see *Database of State Incentives for Renewables and Efficiency*, N.C. CLEAN TECH. CTR., <http://www.dsireusa.org> [<https://perma.cc/35KW-S7GT>].

138. For a primer on energy building codes, see *Building Energy Codes Program*, U.S. DEPT. OF ENERGY, OFF. OF ENERGY EFFICIENCY & RENEWABLE ENERGY, <https://www.energy.gov/eere/buildings/building-energy-codes-program> [<https://perma.cc/AFK5-APY5>].

139. These might include federal corporate average fuel economy (café) standards and local bans on internal combustion engine vehicles. For a primer on the former, see Jody Freeman, *The Obama Administration’s National Auto Policy: Lessons from the ‘Car Deal,’* 35 HARV. ENV’T L. REV. 344, 344-64 (2011). For a description of the latter, see Raquel Soat, *ICE Bans Begin to Take Shape In the US*, FORBES (Nov. 4, 2020), <https://www.forbes.com/sites/pikeresearch/2020/11/04/ice-bans-begin-to-take-shape-in-the-us/?sh=7a10b8633e17> [<https://perma.cc/PEE3-HGRU>].

140. For a discussion of planning and development that supports daily lives that consume less energy, among other things, see *Ten Key Principles of Low Carbon Urbanization*, NAT. RES. DEF. COUNCIL (Dec. 2015), <https://www.nrdc.org/sites/default/files/10-key-principles-of-low-carbon-urbanization-1126.pdf> [<https://perma.cc/L4CK-QGJT>].

like the Climate Leadership Council,¹⁴¹ some oil companies,¹⁴² and members of Congress;¹⁴³ (ii) carbon “adders” to energy prices of the kind being contemplated by FERC;¹⁴⁴ (iii) cap and trade regulation, which was at the heart of the Waxman-Markey bill and some existing regional carbon regimes;¹⁴⁵ and (iv) subsidies, such as the Clean Energy Payment Program proposed in the Democrats’ 2021 budget reconciliation bill,¹⁴⁶ existing federal tax credits for green energy¹⁴⁷ and carbon sequestration,¹⁴⁸ or direct government financial support for technologies like nuclear power or clean coal.¹⁴⁹ Each regulatory instrument incentivizes different behaviors from different sets of actors, and shapes price competition among technologies differently, in ways that are only partly predictable. It is little wonder that these policy choices trigger intense political conflict. This is not simply the difficult “entrepreneurial politics” of the Lowi-Wilson Matrix;¹⁵⁰ it is an especially thorny example, given the penetration of energy choices and habits throughout the American economy. The politics of such policies are likely to fail in Congress, which may explain why a national clean energy mandate was stricken from the 117th Congress’s “Build Back Better” legislation. Indeed, the intractability of these high stakes conflicts is why major regulatory legislation is so rare.

141. See *The Four Pillars of Our Climate Leadership Plan*, CLIMATE LEADERSHIP COUNCIL (Sept. 2019), <https://clcouncil.org/our-plan/> [<https://perma.cc/89GC-YCKG>] (placing a revenue-neutral carbon tax at the center of that plan).

142. Jennifer A. Dlouhy & Leslie Kaufman, *How the Oil Lobby Learned to Love Carbon Taxes*, BLOOMBERG GREEN (Mar. 4, 2021), <https://www.bloomberg.com/news/articles/2021-03-04/how-the-oil-lobby-learned-to-love-carbon-taxes> [<https://perma.cc/99BQ-8F8B>].

143. In the Senate, Democrat Ron Wyden and Republican Mitt Romney have been the most prominent congressional proponents of a carbon tax. See Laura Davidson, Ari Natter & Jennifer A Dlouhy, *Democrats Prep Carbon Tax Option to Pay for Spending Bill*, BLOOMBERG (Sept. 24, 2021), <https://www.bloomberg.com/news/articles/2021-09-24/democrats-prep-a-carbon-tax-as-option-to-pay-for-biden-s-agenda> [<https://perma.cc/X35U-CNME>].

144. See FERC Policy Statement on carbon adders, *supra* note 121.

145. In the United States, the two most prominent carbon trading regimes are the Regional Greenhouse Gas Initiative, a cap-and-trade regime established cooperatively by a group of northeastern states, and the California cap-and-trade regime administered by the California Air Resources Board. *Reg’l Greenhouse Gas Initiative*, CAL. AIR RES. BD., rggi.org [<https://perma.cc/RA9Q-VLEW>]; *Cap-and-Trade Program*, CAL. AIR RES. BD., <https://ww2.arb.ca.gov/our-work/programs/cap-and-trade-program> [<https://perma.cc/RLU8-T89X>].

146. See the discussion of the revision of those tax credits under the 117th Congress’s infrastructure legislation, *supra* note 75.

147. These include an investment tax credit for solar power and a production tax credit for wind power. For an analysis of both, see Felix Mormann, *Beyond Tax Credits: Smarter Tax Policy for a Cleaner, More Democratic Energy Future*, 31 YALE J. ON REGUL. 303 (2014).

148. This refers to the so-called “45Q” tax credit for CCS found in the Internal Revenue Code, 26 U.S.C. § 45Q.

149. See, e.g., Energy Policy Act of 2005, Pub. L. No. 109-58, tit. IV, 119 Stat. 594, 749 (creating programs to offer financial support for coal fired power plants fitted with advanced pollution controls); *id.* tit. VI, 119 Stat. at 779 (establishing various forms of financial support for new nuclear power plants).

150. While its utility is sometimes debated, for decades this matrix has been used as a shorthand way of classifying the politics typical of different kinds of legislation, depending upon how the legislation would reallocate costs and benefits across society. It is named after two political scientists: Theodore J. Lowi and James Q. Wilson. See Theodore J. Lowi, *American Business, Public Policy, Case-Studies, and Political Theory*, 16 WORLD POL. 677 (1964); JAMES Q. WILSON, *THE POLITICS OF REGULATION* 357-94 (James Q. Wilson ed., 1980).

To more fully appreciate the complexity of the political task, consider what is probably the easiest sector to transition to net zero rapidly: the electricity sector. Some models of the transition envision an all-renewable electric grid, one that uses stored electricity to provide backup power.¹⁵¹ Others suggest that such a system would be either too costly or not reliable enough, and that the electric grid ought to retain some firm (non-weather-dependent) generation resources¹⁵² in order to maintain existing levels of service reliability, and affordability.¹⁵³ Depending upon how much new renewable generation and associated transmission is built, those firm resources would be called upon very infrequently, raising the question of how to incentivize their existence and maintenance. Some estimates of the out-of-pocket price of a renewables-only supply (one that excludes firm, low-carbon resources) are high—in the tens of thousands of dollars per household.¹⁵⁴ Others are much lower.¹⁵⁵ And reasonable people disagree, sometimes vehemently, about whether those firm resources ought to include gas-fired generation with carbon sequestration or nuclear power. Furthermore, a massive build-out of wind, solar and batteries consistent with a zero-carbon emission future implies huge increases in world outputs of copper, zinc, aluminum, lead, silver, cadmium, lithium and various other minerals that are used in the production of these forms of energy production and storage (some

151. See, e.g., MARK Z. JACOBSON, 100% CLEAN, RENEWABLE ENERGY AND STORAGE FOR EVERYTHING (2020) (modeling a future world economy powered only by wind, solar and hydro power).

152. In this literature, the term “firm resources” refers to generation that is not intermittent and could be called upon to provide electricity regardless of weather conditions. See, e.g., Jesse Jenkins & Scott Thornstrom, *Deep Decarbonization of the Electric Power Sector: Insights from Recent Literature*, ENERGY INNOVATION REFORM PROJECT (Mar. 2017), www.innovationreform.org/wp-content/uploads/2018/02/EIRP-Deep-Decarb-Lit-Review-Jenkins-Thornstrom-March-2017.pdf [<https://perma.cc/MN7Z-ZV43>]; Nestor A. Sepulveda et al., *The Role of Firm Low-Carbon Electricity Resources in Deep Decarbonization of Power Generation* 2 *JOULE* 2403 (2018).

153. In most of the country, a great deal of additional renewable energy can be substituted for fossil energy without triggering these tradeoffs. But decarbonizing that last 15% or 20% of generation creates the need for large amounts of redundant (and currently more expensive) generation and energy storage; and reductions in fuel diversity equate to reductions in long-term reliability.

154. Wood MacKenzie puts the cost at \$35,000 per household. Dan Shreve & Wade Schauer, *Deep Decarbonization Requires Deep Pockets*, WOOD MACKENZIE (June 2019), www.decarbonisation.think.woodmac.com/ [<https://perma.cc/EB23-YKVR>]; see also Iulia Gheorghiu, *Transitioning US to 100% Renewables by 2030 Will Cost \$4.5 Trillion: Wood Mackenzie*, UTILITYDIVE (June 28, 2019), www.utilitydive.com/news/transitioning-us-to-100-renewables-by-2030-will-cost-rate-payers-45t-wo/557832/ [<https://perma.cc/UV68-AY5Q>]; Anthony Watts & Tim Benson, *Analysis: Cost of U.S. Transition to 100% Renewables – \$4.5 Trillion*, WATTS UP WITH THAT? (July 9, 2019), www.wattsupwiththat.com/2019/07/09/analysis-cost-of-u-s-transition-to-100-renewables-4-5-trillion [<https://perma.cc/3M66-Q2UZ>]. The center-right American Action Forum puts the cost at \$5.7 trillion, or \$42,000 per household. Philip Rossetti, *What It Costs to Go 100 Percent Renewable*, AM. ACTION FORUM (Jan. 25, 2019), www.americanactionforum.org/research/what-it-costs-go-100-percent-renewable [<https://perma.cc/W2BQ-EEY8>].

155. Some argue that because spending on new clean energy resources is not mostly additive, but rather replaces investments that would have been made on dirtier energy resources, per capita additional costs are smaller. See Gernot Wagner, *The Cost to Reach Net Zero By 2050 is Actually a Bargain*, BLOOMBERG GREEN (Jan. 28, 2022, 6:00 AM EST), at <https://www.bloomberg.com/news/articles/2022-01-28/the-cost-to-reach-net-zero-by-2050-is-actually-a-bargain> [<https://perma.cc/JC87-24RM>].

of which come from countries with lax environmental standards).¹⁵⁶ Analysts do not agree about how this surge in demand will affect the cost trajectory of these technologies over the long term,¹⁵⁷ and the interruption of supply chains by the recent pandemic and war makes estimating those costs even more difficult.

These high-stakes *how* questions are the stuff of interest group conflict: (i) whether to decarbonize electric generation fuels, or only their associated emissions; (ii) whether and how to compensate the economic losses associated with rejected technologies; (iii) how to allocate the out-of-pocket costs of new electricity infrastructure (to ratepayers, or to taxpayers); and (iv) deciding in whose neighborhoods all that new infrastructure will be built. These choices implicate not only the industries involved, but NGOs and others with large ideological stakes in the outcome, each of whom will appeal to their elected representatives in an attempt to influence the choices. And this list merely scratches the surface of the full set of major questions that transitioning to a net zero electric grid will entail. Indeed, the process of decarbonizing other sectors—buildings, agriculture, manufacturing, and transport—requires equally-difficult, high-stakes choices about the optimal means to the desired end: a net zero carbon emission economy.

C. *The Policymaking Implications of Complexity*

If the Supreme Court means to throw a gauntlet at the feet of Congress by limiting agencies' ability to make these kinds of complex, high stakes policy choices, today's politics offer little to no hope that Congress will be able to pick it up. The interrelationship between techno-economic complexity and policy complexity not only feeds Republican opposition to climate policy, but also drives wedges into the (mostly Democratic Party) climate coalition. Moderate Democrats tend to favor policies that nudge markets or incentivize desired behavior, like carbon taxes that increase the cost of dirty fuels, steering resources toward cleaner ones and passing the costs on to ratepayers.¹⁵⁸ Progressive Democrats tend to favor direct government ownership or government-subsidized investments funded by taxpayers.¹⁵⁹ Progressives tend to see fossil fuel industries

156. One analysis put the required increase in lithium production above current levels at 2,700%. Jason Hicke, *The Limits of Clean Energy*, FOREIGN POL'Y (Sept. 6, 2019), www.foreignpolicy.com/2019/09/06/the-path-to-clean-energy-will-be-very-dirty-climate-change-renewables/ [<https://perma.cc/2X2C-PNG6>].

157. We can expect that increased demand for raw materials will beget price increases, which then beget supply increases and subsequent price decreases. But what that means for long term prices of these technologies is uncertain.

158. In Congress, this point of view is represented by the Bipartisan Climate Caucus and, in the Democratic Party, by the New Democrat Caucus.

159. The original Green New Deal resolution introduced in the House of Representatives in the 116th Congress by Rep. Ocasio-Cortez called for government ownership and development of new clean energy infrastructure. Recognizing the Duty of the Federal Government to Create a Green New Deal, H.R. Res. 109, 116th Cong. (2019). In the 117th Congress, the Build Back Better legislation originally included the so-called Clean Energy Performance Program, under which the federal government would have subsidized a transition to a net zero electric sector. See Build Back Better Act, *supra* note 76. However, that provision was stricken from the bill before either chamber took action on it.

as subverters of the politics of the green energy transition and tend to oppose policies that incentivize CCS or other negative emissions technologies that could enable fossil generation to participate in a net zero future.¹⁶⁰ Moderate Democrats, some of whom represent fossil-fuel producing states in Congress (like New Mexico and Pennsylvania) tend to favor an “all of the above” path to a net zero future.¹⁶¹

Social scientists have long noted the difficulty of cobbling together congressional majorities for major regulatory legislation, ascribing that difficulty to some combination of wealth or pro-business bias in the policy process and a constitutional design that supposedly favors inertia. Nevertheless, Congress has at times found ways to impose bold, new forms of regulation on the market. It did so when it passed the Clean Air Act and the Federal Power Act, two statutes that posed similarly difficult tradeoffs. Historically these kinds of laws are enacted rarely, but regulation does happen. Scholars have focused a lot of attention on when it happens. Organization theorists have long argued that durable policy change is possible only during rare historical moments in which political forces align fortuitously. John Kingdon’s formulation of this idea is perhaps the most commonly-cited. Kingdon hypothesized that legislation is most likely when there exists a common understanding of the policy problem to be addressed to which there exists an apparent policy solution, *and* sufficient support among politicians to match the solution to the problem.¹⁶² The currently-fashionable term “the Overton Window,” is another way of describing a part of the Kingdon analysis: namely, the idea that there is a set of possible policies defined at any given moment by what is acceptable and salient to enough people to motivate political action.¹⁶³ Economist Anthony Downs described a version of this idea as part of something he called “the issue attention cycle.”¹⁶⁴ Legal scholar James Gray Pope proffered a similar idea that he called “republican

160. See, e.g., Kate Aronoff, *Carbon Capture Is Not a Climate Savior*, NEW REPUBLIC (Dec. 24, 2020), <https://newrepublic.com/article/160754/carbon-capture-not-climate-savior> [<https://perma.cc/22JS-87RV>] (characterizing carbon sequestration as a kind of ruse designed to cast doubt on a “new consensus” in favor of “phas[ing] out fossil fuel as quickly as possible while phasing in renewables”); Alejandro de la Garza, *Climate Experts Say Vacuuming CO2 From the Sky Is a Costly Boondoggle. The U.S. Government Just Funded It Anyway*, TIME (Dec. 2, 2021), https://time.com/6125303/direct-air-carbon-capture-infrastructure/?utm_medium=email&utm_source=sfmc&utm_campaign=newsletter+brief+default+ac&utm_content=+++20211205+++body&et rid=185586989&lctg=185586989 [<https://perma.cc/SU52-RPV4>] (quoting environmentalists opposing carbon sequestration funding).

161. In New Mexico, 2 of 3 representatives are Democrats; in Pennsylvania, 9 of 18 representatives are Democrats. See *Directory of Representatives*, U.S. HOUSE OF REPRESENTATIVES (2021), <https://www.house.gov/representatives> [<https://perma.cc/2DXP-VV65>].

162. JOHN W. KINGDON, *AGENDAS, ALTERNATIVES AND PUBLIC POLICIES* 124-31 (2d ed. 2003).

163. For a history of this idea, see *The Overton Window*, MACKINAC CTR. FOR PUB. POL’Y, <https://www.mackinac.org/OvertonWindow> [<https://perma.cc/3C2W-RJ3S>].

164. Anthony Downs, *Up and Down with Ecology – The ‘Issue-Attention’ Cycle*, 1972 PUB. INTEREST 28.

moments,” instances in which “normally quiescent citizens” rise up and demand action from their elected representatives.¹⁶⁵

One might see the Supreme Court’s delegation jurisprudence as an attempt to hasten the issue attention cycle, or move the Overton Window, or foment a republican moment. Perhaps the Court believes that preventing regulators from crafting solutions to important policy problems will motivate a critical mass of voters to care enough about the climate emergency to demand a solution, overcoming the interest-group conflicts described in Section II.B. But history suggests that a persistent, important unsolved problem is not sufficient to motivate congressional action. More is required. Congress tends to enact major regulatory legislation only when either of two conditions are present: (i) one party controls the legislative and executive branches with large congressional majorities, or (ii) there are relatively low levels of cross-party ideological disagreement on the wisdom of regulating to address the problem. Indeed, the statutes that built most of the modern administrative state (including both the Clean Air Act and the Federal Power Act) were enacted under these kinds of political conditions, during three relatively brief historical windows: (i) the roughly thirty-year period comprising most of the (temporally adjacent) Populist and Progressive eras (roughly, late 1880s to 1916); (ii) the six pre-World War II years of the New Deal (1933 to 1939); and (iii) the post-WWII era of the consumer and environmental protection movements, running from the late 1960s to 1990.

The regulatory legislation of the Progressive and New Deal eras was enacted during periods of unified party control of government in which the majority party enjoyed large congressional majorities in both chambers. For example, the Roosevelt Administration’s New Deal legislation was enacted by congresses in which the Democrats’ smallest margins were 196 seats in the House, and 23 seats in the Senate; that is, Democrats held 196 *more* seats than Republicans in the House, and 23 *more* seats than Republicans in the Senate.¹⁶⁶ The Federal Power Act was enacted under these political conditions. By contrast, the Clean Air Act was enacted in 1970, part of a spate of regulatory legislation enacted with bipartisan support from a Democrat-controlled Congress and from Republicans (including President Richard Nixon) still eager to claim the mantle of environmental leadership for their party.¹⁶⁷

165. James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 310-13 (1990).

166. At one point during the New Deal Democratic Party *margins* were 244 seats in the House and 58 in the Senate. The parties enacting the late Progressive Era statutes also enjoyed control of all the policymaking branches and clear legislative margins as well, ranging between 7 and 26 seats in the Senate, and between 29 and 163 seats in the House. See *Party Divisions of the United States Congresses*, WIKIPEDIA (2022), https://en.wikipedia.org/wiki/Party_divisions_of_United_States_Congresses [<https://perma.cc/QSR4-U3JX>].

167. This phenomenon—a period of partisan competition for the mantle of leadership on a newly emerging set of issues—also explains why some of the regulatory legislation enacted during the Populist/Progressive Era was enacted by unified Republican Party governments, and others by unified Democratic Party governments, each with clear congressional majorities. There was competition between

Neither of the conditions conducive to the passage of major regulatory legislation seems remotely likely to materialize in the United States any time soon. As of this writing, Democrats control both houses of the 117th Congress, but by razor thin margins.¹⁶⁸ Many election pundits believe it possible the party could lose one or both chambers in the 2022 elections, so the prospect of building large majorities in both chambers seem vanishingly small. Indeed, as Democrats concentrate in cities¹⁶⁹ and Republican state legislatures draw new legislative districts and change voting rules¹⁷⁰ to gain a procedural advantage, rural (and largely conservative) voters will continue to be overrepresented in Congress,¹⁷¹ particularly in the Senate.¹⁷²

Nor is bipartisan cooperation on the horizon. As already noted, Republican congressional leadership has actively opposed climate legislation in recent congresses, and the ideological barriers to cross-party cooperation are much higher today than in the 1970s when the Clean Air Act was passed. This point is best illustrated using an oft-cited measure of the ideology of members of Congress: the so-called “DW-NOMINATE” data set, which estimates members’ ideology on a left-right, two-point scale (from -1 to +1), on a dimension that correlates to members’ attitudes toward the regulation of markets.¹⁷³ As shown in Figure 2, the ideological distance between the respective party medians in the House of Representatives on this “markets versus regulation” ideological

the parties in the early twentieth century for the mantle of Progressive leadership, a competition led on the Republican side by Theodore Roosevelt.

168. The parties are split evenly in the Senate, and Democrats have a three-vote majority in the House.

169. See, e.g., BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICANS IS TEARING US APART* 35 (2008) (discussing the “politics of place” that allow communities to “maintain political cohesion”); Jamie L. Carson et al., *Redistricting and Party Polarization in the U.S. House of Representatives*, 35 AM. POL. RSCH. 878, 899 (2007) (finding that “congressional districts that have significantly changed are having an effect on levels of polarization in the House”).

170. See, e.g., Geoffrey C. Layman et al., *Party Polarization in American Politics: Characteristics, Causes, and Consequences*, 9 ANN. REV. POL. SCI. 83, 84 (2006) (discussing the “characteristics, causes, and consequences of ideological polarization among the parties’ leaders and elected officials”); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011) (exploring the institutional causes of polarization).

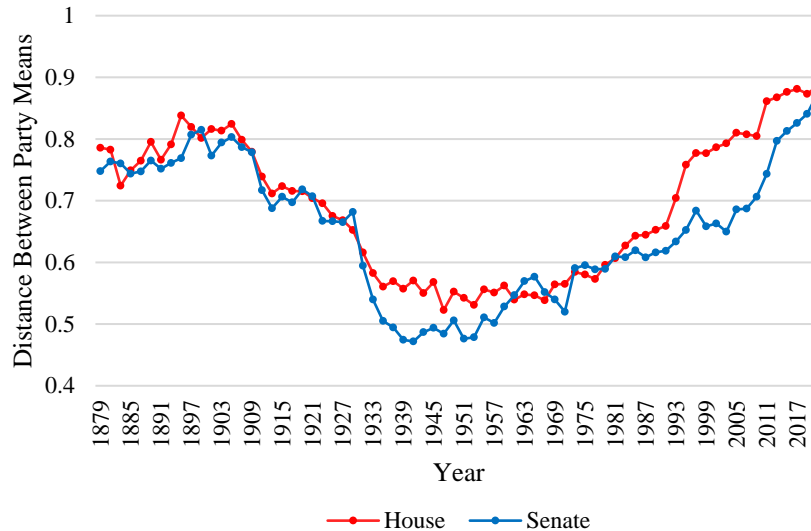
171. See Editorial, *This Is Gerrymandering at Its Worst. It Doesn’t Have To Be This Way.*, WASH. POST (Feb. 1, 2022), <https://www.washingtonpost.com/opinions/interactive/2022/gerrymandering-examples-north-carolina-illinois-alabama-texas-how-to-fix/> [<https://perma.cc/5Q6B-XXGK>] (“Republicans pack Democratic cities into tiny blue districts and spread other Democrats across light red areas, diluting their influence.”).

172. See Nate Silver, *The Senate’s Rural Skew Makes It Very Hard for Democrats to Win the Supreme Court*, FIVETHIRTYEIGHT (Sept. 20, 2020, 9:42 AM), <https://fivethirtyeight.com/features/the-senates-rural-skew-makes-it-very-hard-for-democrats-to-win-the-supreme-court/> [<https://perma.cc/X5YJ-QWHG>]; Mathew Yglesias, *American Democracy’s Senate Problem, Explained*, VOX (Dec. 17, 2019, 11:40 AM EST), <https://www.vox.com/policy-and-politics/2019/12/17/21011079/senate-bias-2020-data-for-progress> [<https://perma.cc/6BN7-DGDM>].

173. The DW-NOMINATE procedure was created and maintained by Jeffrey B. Lewis, Keith Poole, Howard Rosenthal, Adam Boche, Aaron Rudkin, and Luke Sonnet. See *About the Project*, VOTEVIEW, <https://voteview.com/about> [<https://perma.cc/FM8P-YRS6>]. Numbers represent the positions of members of Congress on the DW-NOMINATE first dimension. The brackets on the ideology scale represent the ideological boundaries of the Congressional party in that chamber.

dimension was less than 0.6 in the 1970s;¹⁷⁴ it is currently 0.86, a distance not seen since the Civil War era.¹⁷⁵

Figure 2: Ideological Distance Between the Congressional Parties¹⁷⁶



To be clear, these data do not negate the possibility that the partisan environment might change to facilitate a republican moment, particularly if public alarm over the costs of a changing climate grows. The enormous Democratic Party majorities enjoyed by Franklin Roosevelt during the New Deal were built relatively quickly, over a few electoral cycles. The Congress elected in the 1930 midterm elections reduced the prior Republican margins from seven seats to one seat in the Senate, and 104 seats to zero seats¹⁷⁷ in the House of Representatives. Two electoral cycles later (1935) Democrats enjoyed majorities of 44 seats in the Senate and 219 seats in the House.¹⁷⁸ More interestingly, the Depression produced a rapid decline in the ideological distance between the parties on questions of regulation as shown in Figure 2. For the Congress in place at the time of the stock market crash (1929) the ideological distance between

174. Historian Richard Hofstadter labelled this period of reduced ideological division “the New Deal Consensus.”

175. It is greater than 0.85 as of this writing. See *Data*, VOTEVIEW, <https://voteview.com/data> [<https://perma.cc/TC59-WMHE>].

176. This figure is taken from the Voteview website. Jeff Lewis, *Polarization in Congress*, VOTEVIEW (Jan. 20, 2022), https://voteview.com/articles/party_polarization [<https://perma.cc/74T3-GVRS>].

177. Republicans and Democrats each held 217 seats; a third party held the remaining seat.

178. See *Party Divisions in the United States Congresses*, *supra* note 166.

party medians in the House was 0.61 points;¹⁷⁹ two congresses later it has fallen to 0.45, an all-time low.

Unfortunately, the prospects for a similarly rapid shift in the congressional environment today seem very small. After strong Democratic Party gains in the 2018 election,¹⁸⁰ one might have expected additional sharp gains in 2020 given the Trump Administration's incompetent and unpopular¹⁸¹ response to the COVID-19 pandemic and the deep recession the pandemic produced. Trump lost the 2020 presidential election, and Democrats gained seats in the Senate; yet Democrats lost 13 seats in the House, many of them seats the party had flipped from Republican to Democrat in 2018. During the Great Depression, a large swath of the electorate channeled dissatisfaction with the Republican response into votes for Democrats. Today, that sort of voter response is dampened or interrupted by the rise of affective, negative partisanship¹⁸²—identity-based partisanship reinforced continuously by emotional messages shared within social-media information bubbles.¹⁸³ Polling today suggests that partisan attachments are strong and fixed, and less correlated with issue preferences, blocking the translation of issue preferences and public dissatisfaction with governance into shifting partisan voting preferences.¹⁸⁴

Thus, if climate legislation comes at all, it will come not as a republican moment with massive support in Congress, but rather by very thin legislative margins with little or no Republican support. That does not bode well for the prospect of strong, durable change in climate policy.

III. Delegation, Agency Policymaking and Constitutional Design

Until recently, Congress and the courts endorsed delegation of important decisions to agencies, requiring only the presence of some basic intelligible principle in the enabling legislation to guide those decisions. Administrative-law scholarship has provided ample theoretical support for this idea.¹⁸⁵ If instead the Court insists that Congress make all consequential policy decisions, it will handicap the government's ability to deal with important national problems. Indeed, such an approach presents Congress with a nearly-impossible climate

179. This difference had fallen steadily in the previous decade, however, from 0.79 at the end of World War I to 0.61 in 1929.

180. This was a midterm election that saw the Democrats gain 41 seats (and a 38-seat majority) in the House of Representatives.

181. See Julie Pace, Hannah Fingerhut & Nathan Ellgren, *AP-NORC Poll: Americans Critical of Trump Handling of Virus*, ASSOCIATED PRESS (Oct. 15, 2020), at <https://apnorc.org/ap-norc-poll-americans-critical-of-trump-handling-of-virus/> [<https://perma.cc/3N2C-6GZ2>].

182. See the definitions of these terms *supra* note 13.

183. A growing literature on the effect of balkanized social media information systems on politics and ideological polarization is beyond the scope of this article. For a general treatment, see ELI PARISER, *THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU* (2012).

184. See Iyengar et al., *supra* note 13.

185. For a history of that literature dating back to before the APA, see David B. Spence, *Agency Policy Choice and Political Control: Modeling Away the Delegation Problem*, 7 J. PUB. ADMIN. RSCH. & THEORY 199 (1997).

policy task, one that ignores both the difficulty of cobbling together majority support for consequential regulatory choices¹⁸⁶ and the Founders' design. Delegation of consequential decisions to experts is a necessary attribute of effective governance, one that is entirely consistent with the notions of political accountability that concern the Court.

A. Means, Ends and the Delegation Imperative

It is a well-established principle of law that one cannot write an *ex ante* rule that will apply efficiently to every unforeseen situation that might arise within the domain of the rule.¹⁸⁷ This need for flexible, adaptable rules is behind our attachment to common-law decision making¹⁸⁸ and is part of the case for dynamic statutory interpretation.¹⁸⁹ Cobbling together legislative majorities to address important national problems is difficult enough; sometimes a majority can agree on the legislative objective, but not the means by which it ought to be achieved. Indeed, sometimes Congress understands that good governance requires delegating those choices to others, precisely because it cannot and should not make all important policy choices. Arguably Congress did just that when it created the regulatory structures found in the Clean Air Act and Federal Power Act. By delegating to the EPA and FERC the power to identify and address *future* risks, it made the efficient and effective governance decision.

The Clean Air Act is an almost entirely forward-looking statute. It empowers the EPA to identify new pollutant risks and to regulate their emission.¹⁹⁰ Permitting standards under the Act are *relative*; that is, they are defined so as to grow more stringent over time in the absence of congressional

186. Callander and Krehbiel's recent formal model of delegation arguably supports the notion that courts ought to respect broad delegations to agencies for just this reason; it demonstrates theoretically that such delegations help Congress overcome gridlock and produce decisions that the legislature could not make but for the delegation. Steven Callander & Keith Krehbiel, *Gridlock and Delegation in a Changing World*, 58 AM. J. POL. SCI. 819 (2014).

187. For a review of the legal and political science literature exploring this proposition in the context of congressional delegations, see David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. LEGAL STUD. 413 (1999).

188. See, e.g., BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (2010) (expounding upon these virtues of the common law); Roscoe Pound, *Anachronisms in Law*, 3 J. AM. JUDICATURE SOC'Y 142, 144 (1920) (describing "institutions, doctrines, and rules which have survived the original reasons of their contrivance . . . but now impede effective administration of justice").

189. For a thorough exposition of this argument, see WILLIAM N. ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* (1994).

190. The statute defines "air pollutant" broadly to include any pollution agent emitted into the ambient air, and authorizes the EPA to regulate those pollutants that endangered public health and welfare. 42 U.S.C. § 7602(g) (2018). The Supreme Court affirmed that authority in *Massachusetts v. EPA*, 549 U.S. 497 (2007), which acknowledged the breadth and prospective function of this definition. The statute contemplates that the agency will identify new pollutants and regulate their emissions. See, e.g., 42 U.S.C. § 7409(a)(2) (2018) (contemplating new standards for conventional pollutants in the future), § 7409(d) (establishing a process for revising air quality standards every five years); § 7412(b)(2), (3) (contemplating EPA- and petitioner-initiated revisions to the list of toxic pollutants regulated under the statute).

action.¹⁹¹ Congress anticipated that regulation under the statute would be economically consequential, and consciously chose to specify when and how those economic consequences should influence the EPA's decisions. As noted above, for example, it directed the EPA to consider costs under Section 111,¹⁹² but it directed the EPA to ignore costs when establishing air quality standards under Section 109.¹⁹³ EPA's regulation of conventional pollutants has already proven economically consequential: its rules governing emissions of carbon monoxide, oxides of nitrogen and sulfur, and fine particles have changed the electric power sector.¹⁹⁴ Strict regulation of toxic pollutants sharply reduced demand for arsenic¹⁹⁵ and asbestos¹⁹⁶; and the EPA's regulation of mercury emissions triggered the closure of hundreds of coal-fired power plants.¹⁹⁷ Indeed, the statute can *only* be understood as an attempt by Congress to equip the EPA with the tools to regulate both current and future risks. Section 111(d) represents an attempt to cover future eventualities that might not fit easily into the remainder of the regulatory regime.

Congress's enactment of the Federal Power Act is similarly forward-looking, but in a different way. It sought to give FERC the flexibility needed to manage wholesale power and transmission markets over time. By authorizing FERC to regulate (practices affecting) rates according to the elastic "just and reasonable" standard,¹⁹⁸ Congress was acting with the same kind of humility about the future it demonstrated in enacting the Clean Air Act. That delegation of power and flexibility has facilitated the kind of expert governance that has allowed electricity markets to move from norms of heavy-handed price regulation to new norms of competition and market pricing, and to otherwise adapt to a changing world—without the need to amend the statute. This disruptive transformation of power markets forced utilities to divest generation resources and subjected wholesale power sellers to price risks Congress never authorized or foresaw in 1935.¹⁹⁹ When market participants injured by these

191. The statute's technology-based standards are expressed in relative terms, like "best available control technology" (42 U.S.C. § 7479 (2018)) and "maximum achievable control technology" (42 U.S.C. § 7412 (2018)) that call for more stringent emissions limits over time as technology improves and penetrates emitting sectors of the economy.

192. 42 U.S.C. § 7411(a)(1) (2018) (specifying that standards of performance for sources regulated under that section "tak[e] account" of the costs of achieving the mandated emission reduction).

193. 42 U.S.C. § 7409 (2018) (establishing exclusively health-based criteria for national ambient air quality standards).

194. See Adelman & Spence, *supra* note 73, for a description of the EPA rules that exerted those effects.

195. National Emission Standard for Inorganic Arsenic Emissions From Glass Manufacturing Plants, 40 C.F.R. pt. 61, subpart N (1986) (banning most emissions).

196. National Emission Standard for Asbestos, 40 C.F.R. pt. 61, subpart M (1990) (setting a "no visible emissions" standard).

197. National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units-Reconsideration of Supplemental Finding and Residual Risk and Technology Review, 85 Fed. Reg. 31,320 (May 22, 2020) (to be codified at 40 C.F.R. pt. 63).

198. 16 U.S.C. § 824(e) (2018).

199. In 1992, Congress did amend that Act to allow the EPA to require owners of transmission lines to transmit power for third parties. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776.

changes challenged them as beyond the authority conferred in the statute, the federal courts brushed aside those challenges.²⁰⁰ In the Federal Power Act (as in the Clean Air Act) Congress established a clear statutory objective—just and reasonable prices—and empowered FERC to decide how that objective might be achieved.

This flexibility afforded by delegation is a central attribute of good governance. As long as Congress establishes the appropriate ends, it makes practical sense to delegate to knowledgeable experts the decisions about the best means to those ends. When the Court focuses its review on the economic or political significance of a choice, it misses the point. There is no bright-line distinction between “policymaking” and “policy implementation,” certainly not one based upon the economic or political significance of the question being answered. There *is* a distinction to be made between establishing a regulatory objective, on the one hand, and deciding how that objective ought to be achieved (in particular situations over time and space), on the other. It makes sense for Congress to be able to delegate these “how” questions to agents. All the better if those agents have (or can develop) the expertise that Congress has neither the time nor the inclination to develop. One need not embrace some naïve vision of scientific, apolitical administration in order to see the value in delegation to experts. To the contrary, one need only appreciate the value of deliberation and expertise in producing good decisions. Regulating electricity markets and air pollution are complex tasks requiring the application of expertise to problems in a wide variety of different social, technological, and geographic contexts. Agencies are better suited to such tasks.

Of course, Congress *can* weigh in on the “how” questions it delegates to agencies, and can overrule those decisions when it is willing and able to do so. But it is ill-suited to the iterative, ongoing task of making every important regulatory choice; nor should it be required to do so. To be sure, there are many interest groups and members of Congress who would prefer that Congress make the tough decisions about how to achieve carbon reductions. But they, in turn, disagree over how those issues ought to be resolved. There is much more agreement in the climate coalition over ends than means. It makes sense to let experts insulated from political pressure resolve those disputes, and it makes no sense for the Court to prohibit Congress from delegating those decisions to experts. Unless hamstringing the federal government’s capacity to govern is the Court’s objective,²⁰¹ one hopes that it refrains from embracing a Major Questions Doctrine limit on the exercise of delegated discretion.

200. See, e.g., *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004). Despite denying certiorari in the *Lockyer* case, the Supreme Court later denied that it had ever approved a move to competition and market pricing in electricity markets under the Federal Power Act. See *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 548 (2008) (“We reiterate that we do not address the lawfulness of FERC’s market-based-rates scheme . . .”).

201. There are commentators who suggest that Justice Gorsuch’s hostility to the administrative state stems from his mother’s ignominious removal as EPA Administrator after warring with career bureaucrats and congressional Democrats in the early 1980s, when Justice Gorsuch was a boy. See, e.g.,

B. Delegation and Democratic Theory

Arguments that delegation poses problems for representative democracy are omnipresent in administrative law scholarship but have always rung hollow. It is true that the touchstone of legitimacy in democratic governance is *accountability*, and scholars have long worried about whether agencies are sufficiently “accountable” to the public.²⁰² One set of political scientists put it this way:

A central problem of representative democracy is how to ensure that policy decisions are responsive to the interests or preferences of citizens. . . . Because elected officials have limited resources for monitoring [agency decisions], the possibility arises that the bureaucrats will not comply with their policy preferences.²⁰³

This concern seems to be part of Justice Gorsuch’s objection to agency policymaking, but it belies a naïve understanding of the myriad ways in which the administrative state is accountable to the people.²⁰⁴ It is naïve both empirically and normatively, even though many judges and scholars continue to conceive of the delegation problem in this way.²⁰⁵

Indeed, concern over the democratic legitimacy of agency policymaking pervades administrative law scholarship, even among advocates of delegated administrative discretion. For example, one of the most widely cited articles in administrative law, by Peter Strauss, proposes a model of agency legitimation based upon accountability to the institutions at the apex of government—that is, accountability to institutions whose powers the Framers defined in the first three articles of the Constitution. The implication is that unless agencies are directly accountable to Congress, the president and/or the judiciary, one can question the constitutional legitimacy of their policy decisions.²⁰⁶ But this focus on apex institutions elevates form over substance. As explained in this Section, the Constitution describes the authority of the executive branch just as explicitly as

Nancy Benac, *A Teenage Gorsuch Learned from Mother’s Stormy Tenure at EPA*, SEATTLE TIMES (Feb. 2, 2017), <https://www.seattletimes.com/nation-world/gorsuch-schooled-in-ways-of-washington-when-his-mom-led-epa/> [https://perma.cc/JY2M-2PRM]; Adam Liptak et al., *In Fall of Gorsuch’s Mother, A Painful Lesson in Politicking*, N.Y. TIMES (Feb. 4, 2017), <https://www.nytimes.com/2017/02/04/us/politics/neil-gorsuch-supreme-court-nominee.html> [https://perma.cc/ZYJ5-87ML].

202. For a history of this literature, see David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REGUL. 407, 411-38 (1997).

203. Matthew D. McCubbins, Roger Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, J. L. ECON. & ORG. 243, 243 (1987).

204. There is also an academic literature addressing the nondelegation doctrine from an originalist perspective. See, e.g., Craig Green, *Chevron Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654 (2020) (“The historical evidence supports the normative arguments that Chevron is consistent with the basic structures of constitutional law.”); Julian Davis Mortenson & Nicholas Bagby, *There’s No 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/8PAW-MRAX] (contending that the Founders believed Congress could delegate any decision it could make itself, and that delegation would not concern them).

205. See Jennifer Selin, *What Makes an Agency Independent?*, 59 AM. J. POL. SCI. 971 (2015).

206. Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 574, 575-81 (1984).

it does that of the other policymakers in the constitutional design. It legitimizes agency decisions by empowering the president to appoint and oversee (to varying degrees) the actions of agency heads, and by cabining agency policymaking discretion within the limits established by enabling legislation, which itself is the creation of Congress and the president. And it offers the judiciary a role in ensuring that agencies remain faithful to the statutory design. Importantly, the constitutional text does not limit the ability of elected politicians to delegate important decisions to executive-branch actors, nor does it suggest some sort of need for agencies to remain faithful to the wishes of Congress other than those expressed in legislation.²⁰⁷

1. Accountability to the President

It is true that there is no separate article of the Constitution exclusively devoted to detailing the powers of administrative agencies, as Articles I through III do for Congress, the president, and the courts, respectively. Agencies *are* delegates, whose mandate is specified by legislation, and whose actions are overseen by the president and the courts. But Article II addresses presidential oversight in ways that legitimate agency decision-making. It does so by explicitly contemplating the creation of new executive-branch institutions (just as Article III explicitly contemplates the creation of lower federal courts), and by charging the president with ensuring that the laws are faithfully executed.

Presidential oversight offers its own form of accountability to voters. If we accept the notion that accountability to elected officials is necessary to legitimate agency policymaking, presidential control is the more obvious, direct, and effective path to legitimacy. Indeed, some scholars argue that presidential oversight is democratically superior to congressional oversight in that it is more likely to reflect broad national interests, rather than the narrower interests of a legislative coalition.²⁰⁸ This argument grows more persuasive as ideological polarization makes bipartisanship more difficult to come by in Congress. Article II vests the executive power in the president²⁰⁹ and explicitly authorizes the president to appoint “public ministers and counsels [and] other officers.”²¹⁰ The Constitution also requires the heads of executive departments to report to the

207. For fuller explanations of this point, see Julian D. Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 332-49 (2021); Joshua C. Macey & Brian Richardson, *What Fourth Branch?* (Working Paper, 2021) (on file with author); Freeman & Spence, *supra* note 69, at 63-82.

208. WILLIAM G. HOWELL & TERRY M. MOE, RELIC: HOW OUR CONSTITUTION UNDERMINES EFFECTIVE GOVERNMENT—AND WHY WE NEED A MORE POWERFUL PRESIDENCY 99-102 (2016). For most of its history, Congress has been an ineffective policymaker, one responsive to parochial forces, while presidents represent the national interest because they are elected by a national constituency. One may wonder whether these conclusions hold up in the face of growing partisan loyalty and reduced salience of ideology in the Trump GOP. Tribal attachment to the leader may give him leeway to pursue less centrist and more extreme positions without risking loss of support.

209. *See id.* and David B. Spence, *A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397 (2002) (using positive political theory to make this point).

210. U.S. CONST. art. II, § 2 (explaining that when Congress creates additional offices, the president will fill those offices with his appointees).

president on the execution of their duties.²¹¹ Through legislation, Congress and the president can structure presidential oversight by establishing decision rules and processes by which agencies must act. But Article II imbues the president with a continuing role overseeing administrative action.²¹²

To be sure, presidential control of the bureaucracy can be used for purposes that subvert the rule of law.²¹³ That sort of subversion violates the duty to remain faithful to the meaning of the statute. The prospect of presidential hostility to the statutory mission represents a vulnerability in the system, one that Jody Freeman and Sharon Jacobs explore in a recent paper. They suggest that presidents who take seriously the duty to execute the laws faithfully may need to take action to repair the damage done by their predecessors who do not. Ideally, voters will punish the intentional subversion of statutory missions.²¹⁴ If they do not, another potential cure is a vigilant judiciary: when presidents and agencies conspire to stray from that meaning, the judiciary offers a check against that faithlessness (with whatever legitimacy that their status as an apex institution confers).

Nor does the growth of the administrative state undermine the legitimating power of presidential oversight, contrary to the worries of some scholars. Accountability does not imply constant *involvement* in agency decisions. Rather, it requires the *ability to influence* those decisions. It is entirely logical and foreseeable that the executive branch would grow over time, as the nation has grown and its problems have become more complex. Decentralization of decision-making and delegation of authority are a necessary and inevitable part of that growth. Organizations become more complex as they grow in size, necessitating delegation; so too with governments. Article II set the rules by which the modern administrative state was built, and those rules establish the

211. *Id.*

212. It is beyond the scope of this Article to weigh in on longstanding debates about the unitary executive and arguments that there exist separation of powers limits on Congress's ability to structure agency action. For a critical exploration of those debates, see DANIEL A. FARBER, *CONTESTED GROUND: HOW TO UNDERSTAND THE LIMITS OF PRESIDENTIAL POWER* (2021).

213. See Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 588 (2021) (arguing that the anti-regulatory objectives of presidents who cannot secure changes in the agency's regulatory mission legislatively can be served by destroying the agency's capacity to execute that mission). *But cf.* Cary Coglianese, Natasha Sarin & Stuart Shapiro, *The Deregulation Deception*, U. PA. CAREY SCH. OF LAW: LEGAL SCHOLARSHIP REPOSITORY (June 21, 2021) (challenging the Trump Administration's claims to have accomplished its deregulatory objectives); Daniel E. Lewis & Nicholas R. Bednar, *Presidential Investment in the Administrative State* (Working Paper, 2021) (on file with author) (concluding that presidents invest selectively in administrative capacity when it suits their electoral interests).

214. Partisan polarization may weaken this potential cure in several ways. One is by the separation of voters' policy preferences from their voting decisions. See the discussion of affective and negative polarization, *supra* note 13 and accompanying text. Another is by the potential alteration of voting rules so as to enshrine a kind of semi-permanent minority rule by anti-regulatory Republican presidents. For a description of how this may be happening, see Barton Gellman, *Trump's Next Coup Has Already Begun*, ATLANTIC (Dec. 6, 2021), <https://www.theatlantic.com/magazine/archive/2022/01/january-6-insurrection-trump-coup-2024-election/620843/> [<https://perma.cc/E3CB-PDYY>]; and Will Wilder, Derek Tisler & Wendy R. Weiser, *The Election Sabotage Scheme and How Congress Can Stop It*, BRENNAN CTR. FOR JUSTICE (Nov. 8, 2021), <https://www.brennancenter.org/our-work/research-reports/election-sabotage-scheme-and-how-congress-can-stop-it> [<https://perma.cc/US6G-KN5Z>].

boundaries and the authority for its construction and operation under presidential oversight.²¹⁵

2. Accountability to Congress

Today's Supreme Court majority seems attracted to the notion that Congress ought to exert *ongoing* control over the important decisions that fall within an agency's statutory domain. This idea is not implied by the notion of apex institutions, and it misrepresents the politics of legislation.²¹⁶ The Major Questions Doctrine (or a variant of the Nondelegation Doctrine that incorporates it) seems premised on the notion that in its principal-agent relationship with agencies, "Congress is Congress" rather than a succession of (117 and counting) congresses. But the reality is that there are multiple congresses, and when asked to review an agency policy choice, courts are presented with (i) the question of whether the choice was consistent with the wishes of the enacting Congress (expressed in enabling legislation), *and* (ii) the question of whether the decision is the kind of decision that ought to be made by the current Congress. Only the former question matters. Scholars of all stripes agree that the legitimacy of agency action depends upon ensuring that its decisions are consistent with the goals of the *enacting* Congress, as articulated in the agency's statutory mandate. In our constitutional design, Congress speaks through legislation, making the wishes of the *current* Congress irrelevant to the task of statutory interpretation. Why should agencies owe fealty to the current Congress's preferences if those preferences are not expressed through legislation?

Some scholars see a legitimacy problem with what they call "agency drift" (differences arising over time between the preferences of the agency and Congress),²¹⁷ suggesting that courts ought to be less deferential to agency decisions when the current Congress is gridlocked.²¹⁸ According to this view, the legitimacy of agency policymaking suffers when gridlock makes it more difficult for Congress to muster legislative majorities to amend agency enabling

215. For some examples of the extensive literature on presidential oversight, see Strauss, *supra* note 206; Terry M. Moe, *An Assessment of the Positive Theory of Congressional Dominance*, 12 LEGIS. STUD. Q. 475 (1987); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1826 (2015).

216. It substitutes a reductivist assumption for a complex, nuanced idea—accountability—and in so doing ignores decades of prior scholarship that explores that complexity and nuance. That literature dates back at least to the 1940s, when public administration scholars Herman Finer and Carl Friedrich engaged in (what was then) a famous debate about the normative desirability of agency policymaking discretion. Finer foreshadowed later principal-agent models when he argued that intervention by elected officials is necessary to hold agencies accountable because the electoral connection implies that elected officials have a better understanding of the public good than bureaucrats ever could. Herman Finer, *Administrative Responsibility in Democratic Government*, 1 PUB. ADMIN. REV. 335 (1941). Carl Friedrich, however, saw accountability differently, arguing that bureaucrats' technical expertise and professional norms meant that they make better decisions than those made by relatively uninformed, elected politicians. Carl J. Friedrich, *Public Policy and the Nature of Administrative Responsibility*, in PUB. POL'Y 3-24 (Carl J. Friedrich & Edward S. Mason eds., Harv. Univ. Press 1942).

217. Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243, 245 (1987).

218. Adler & Walker, *supra* note 61, at 1945.

legislation or cut agency budgets. Advocates of this idea premise it on Congress's "constitutional responsibility for regulatory oversight"²¹⁹ or on a more general notion of legislative supremacy within the constitutional design.²²⁰ As congressional gridlock persists, administrative law scholars have begun to worry openly about statutory obsolescence²²¹ and to consider whether statutes can be "unconstitutionally stale."²²² All of these concerns are misplaced.

The legitimacy of agency policymaking does not depend on agency fealty to the will of the current Congress, gridlocked or not. To the contrary, when the preferences of agencies and Congress diverge over time, it is much more likely to be because Congress has "drifted" away from its prior support of the agency's statutory mission. As noted above, there is nothing in the Constitution or the history of its creation to suggest that its current preferences ought to matter at all until Congress can express those preferences through legislation.²²³ Indeed, what *is* the will of a gridlocked Congress? If Congress cannot muster the majority necessary to act on an issue, it has no cognizable will regarding that issue.

William Eskridge and John Ferejohn's idea of "super-statutes" suggests that the Major Questions Doctrine has gotten things backwards. Major regulatory statutes of the type that built the administrative state tend to be thoroughly deliberated laws addressing important problems through broad delegations to regulators. According to Eskridge and Ferejohn, courts ought to treat these super-statutes (if not necessarily other statutes) especially deferentially, dynamically, and flexibly because Congress intended them to be treated that way.²²⁴ Imputing that sort of delegative intent to Congress makes practical good sense. When Congress knows that it cannot anticipate the myriad situations to which a new rule might be applied in the future, that wisdom implies the need to delegate to those better-equipped to apply the rule in those situations.

The courts' only task in judicial review of agency action is to hold the agency to its statutory mission and the will of the enacting Congress that created

219. Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689 (2015).

220. Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501, 502 (2015) (likening judicial deference of agencies to "an ancient royal prerogative . . . [and] . . . a collection of black and grey holes, where executive power goes unchecked by formal and effective legal constraints," and arguing that ultimately "the will of Congress must prevail"); Miranda Yaver, *When Do Agencies Have Agency?: The Limits of Compliance in the EPA* (Working Paper, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2467611 [<https://perma.cc/3VEW-ECHP>] (framing an empirical analysis of the EPA's adherence to the wishes of the current Congress as a compliance problem for Congress, one that goes to the heart of the legitimacy of agency policymaking); John D. Huber & Nolan McCarty, *Bureaucratic Capacity, Delegation and Political Reform*, 98 AM. POL. SCI. REV. 481 (2004) (describing agency policymaking discretion as a potential usurpation of the politicians' constitutional role).

221. See Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140 (2014); Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 923, 927 (2016).

222. Alison Orr Larsen, *Do Laws Have a Constitutional Shelf Life?*, 94 TEX. L. REV. 59, 75 (2015).

223. Macey & Richardson, *supra* note 207.

224. See William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

that mission. The current Congress is an entirely different overseer, one whose authority over the agency is exercised through its actions. When courts choose to shift decisions about how to implement old statutes to the current (gridlocked) Congress, they make a conscious choice to favor the policy status quo ante (read: make adaptive governance more difficult); doing so is no more “democratic” than leaving those decisions with the agency, at least until Congress affirmatively chooses to speak (again) through legislative action. To the contrary, one might argue that by delegating policymaking power to the agency, the enacting Congress designated the agency as the statute’s custodian, and the agency’s claim to that role is arguably the democratically superior one.²²⁵ Public administration scholar Charles Goodsell argues that, in the face of congressional gridlock, bureaucrats should be “stewards of the institutional well-being of the country’s administrative assets,” which implies a duty not merely of “keeping things running smoothly, but also grappling with the large policy decisions that surround the appropriate allocation of public resources.”²²⁶

One rejoinder to this argument is the notion that congressional gridlock (and the status quo bias) is constitutionally preferred. This is the familiar idea that the policymaking process was “designed for deadlock.”²²⁷ This view, which may emanate from the lofty position held by Federalist No. 10 in American civics education,²²⁸ squares nicely with conservatives’ suspicion of the executive branch; arguably, it supports challenges to the legitimacy of exercises of delegated power to address issues the enacting Congress did not specifically foresee when enacting the statute. This view may be widely-held, but it oversimplifies and misrepresents the Framers’ intent.²²⁹ The Framers’ concern about the mischiefs of faction was an anti-populist sentiment, not a generalized preference for inertia in government. To the contrary, Madison and Hamilton worry openly about weakening the capacity to govern in other portions of the Federalist Papers, and explicitly reject the kinds of super-majoritarian decision rules that feed congressional gridlock today.²³⁰ The Framers wanted a government that works—one that serves not temporary passions, but the

225. Freeman & Spence, *supra* note 69, at 7.

226. Charles T. Goodsell, *Public Administration as Its Own Steward in Times of Partisan Deadlock and Fiscal Stress*, 73 PUB. ADMIN. REV. 10 (2012).

227. See JAMES MACGREGOR BURNS, *THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA* 6 (1963) (advancing this notion).

228. That is, many scholars and others may be familiar with the lengthy discussion of the dangers of faction in Federalist No. 10, but not the Founders’ ruminations on the dangers of gridlock elsewhere in the Federalist Papers.

229. See SARAH BINDER, *STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK* (2004) (exploring this misimpression in more detail).

230. In Federalist No. 58, James Madison rejects the requirement of a supermajority to enact legislation, arguing that “the fundamental principle of free [g]overnment would be reversed” by empowering the minority to “take advantage of it to screen themselves from equitable sacrifices to the general weal.” THE FEDERALIST NO. 58 (James Madison). Similarly, in Federalist No. 22, Hamilton denounces supermajority requirements as likely to “destroy the energy of [g]overnment,” adding that when supermajority rules apply, “we are apt to rest satisfied that all is safe, because nothing improper will be likely to be done; but we forget how much good may be prevented . . . by the power of hindering the doing what may be necessary” THE FEDERALIST NO. 22 (Alexander Hamilton).

permanent and aggregate interests of the community.²³¹ This ought to be unsurprising given that the Framers sought to replace a paralyzed and dysfunctional government under the Articles of Confederation with one that could deliberate in order to produce reasoned policy responses to national problems.

Indeed, a spate of recent legal scholarship has raised a strong challenge to the originalist case²³² for a renewed Nondelegation Doctrine. The last few years have seen a series of detailed historical refutations of the originalist anti-delegation arguments, most supporting the conclusion that there was no nondelegation doctrine during the founding period.²³³ As Daniel Farber has noted, there is an incongruity between originalists' hostility to delegation and their attraction to the idea of a unitary executive; the former implies a distrust of the sort of presidential power suggested by the latter.²³⁴ Accordingly, if presidents are charged with the faithful execution of laws,²³⁵ and the constitutional design disfavors domination of any one branch by another,²³⁶ the notion of broad delegations of power to the executive branch makes sense, because faithful execution of the law entails the myriad and important "how" questions associated with executing statutory mandates.²³⁷

231. THE FEDERALIST NO. 10 (James Madison).

232. The originalist attack on delegation comprises an enormous literature. For a selection of the most recent articles, see Philip Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. ONLINE 88 (2020); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021); Aaron Gordon, *Nondelegation Misinformation: A Rebuttal to "Delegation at the Founding" and its Progeny* (Working Paper, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561062 [<https://perma.cc/96K2-HT4W>]; Richard A. Epstein, *Delegation of Powers: A Historical and Functional Analysis*, 24 CHAP. L. REV. 659 (2021); Jennifer Mascott, *Early Customs Laws and Delegation*, 87 GEO. WASH. L. REV. 1388 (2019); and Michael B. Rappaport, *A Two Tiered and Categorical Approach to the Nondelegation Doctrine* (San Diego Legal Studies Paper No. 20-471, 2020).

233. Mortenson & Bagley, *Delegation at the Founding*, *supra* note 207, at 332-49 (2021); see Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 NOTRE DAME L. REV. 243 (2021); Macey and Richardson, *supra* note 207; Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2021); John Vlahoplus, *Early Delegations of Federal Powers*, 89 GEO. WASH. L. REV. 55 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021); and Nicholas R. Parrillo, *Supplemental Paper to: "A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s"* (C. Boyden Gray Center for the Study of the Administrative State Research Paper No. 20-17 Supplement, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696902 [<https://perma.cc/W45U-AA7P>]; Jonathan R. Seigel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937 (2019) (making the more general constitutional case for deference). Cf. Cass Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present and Future*, 2020 SUP. CT. REV. 83 (2020) (arguing that one's sense of the original intent on these questions depends upon one's "political morality").

234. FARBER, *supra* note 212.

235. Article II imposes this duty more directly on the president in Article II, Section 3 ("he shall take Care that the Laws be faithfully executed . . ."), and indirectly in Article II, Section 1, in the text of the president's oath of office.

236. This is the central claim of Macey and Richardson's historical review of the constitutional design. See *supra* note 207.

237. Andrew Kent and co-authors' recent historical and etymological exploration of the faithful execution clause led them to conclude that the Founders believed the executive had a fiduciary duty to adhere to execute statutory mandates. Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019).

3. Other Dimensions of Legitimacy

If the Court is nevertheless troubled by the inability of a gridlocked Congress to respond to agency policy choices, and finds presidential oversight wanting, it can find accountability and/or legitimacy elsewhere by recognizing: (1) the direct public participation component of most agency policy choices; and (2) the idea that agency policymaking more closely resembles the kind of deliberative decision-making envisioned by the original constitutional design than does modern congressional policymaking.

Courts hold agencies to the procedural requirements of the Administrative Procedure Act (APA),²³⁸ which affords the public a right to be heard before agencies make important policy choices, and requires agencies to respond to public comments when engaging in rulemaking, to create records of their decisions, to follow other transparency requirements, and to avoid arbitrary and capricious decisions, among other things.²³⁹ These procedural requirements were designed to legitimate agency action by mimicking legislative and adjudicative processes endorsed by Articles I and III of the Constitution, respectively.²⁴⁰ It is both puzzling and frustrating that so many legal scholars view it as a weak or hollow form of accountability. Some regard this idea as a disappearing fiction and openly lament the disconnect between the APA model of agency decision making and agency decision making in practice.²⁴¹ Others view these departures from the APA ideal as useful adaptations.²⁴² Regardless, these procedural and transparency requirements, and others found in agencies' enabling legislation, create participation rights that are of no small importance, and they represent another way in which agency policy choices remain accountable to the public.

238. Administrative Procedure Act, 5 U.S.C. § 551-559 (2018).

239. 5 U.S.C. § 553 (mandating public participation in rulemaking); 5 U.S.C. § 706 (establishing bases for judicial review of agency action).

240. The most prominent exponent of this idea was administrative law scholar Kenneth Culp Davis. For a summary of Davis's arguments that pluralist participation rights legitimized agency action more than judicial review, see Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism*, 53 VAND. L. REV. 1389 (2000). Daniel Ernst makes a book-length argument for the proposition that the APA codified an agreement emerging from the New Deal that agencies could "exercise[] great discretionary power but only if they treated individuals fairly and kept within the limits imposed by Congress and the Constitution." DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940*, at 7 (2014); see also JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* (1978) (exploring the origins and justification for participatory rights in the American administrative state); Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972) (critically evaluating the value of various public participation rights granted under the APA); Donald J. Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, 70 OKLA. L. REV. 601, 622 (2018) ("[F]or the purposes of accountability and the supply of information to the regulatory process, the Administrative Procedure Act gives everyone [a] meaningful opportunity to participate").

241. See Farber & O'Connell, *supra* note 221.

242. Sohoni, *supra* note 221; see also Abbe Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1828 (2015) (observing that most policymaking nowadays is accomplished using less transparent, more centralized processes, which helps overcome polarization-induced gridlock).

Courts (and scholars) worried about agency policymaking discretion may consider yet another possible argument in favor of its constitutional legitimacy: that today, congressional policymaking does not embody the Founders' ideal of deliberative decision-making nearly as well as agency policymaking does. It is agency policymaking that reflects the kind of careful, studied decision process that the Framers sought to encourage. The Burkean-Madisonian theory of government is about structuring the delegation of decision authority so as to insulate it from the passions of factions and to incentivize careful choices that reflect "the permanent and aggregate interests of the community."²⁴³ The goal is for the government to be responsive not to the temporary whims of current opinion, but rather to decide as the people *would* decide *if* the people could devote the resources and time necessary to understand the problem.²⁴⁴ Madison and Hamilton were less interested in congressional control of the executive branch and more interested in designing a system of "institutions [that] would have some level of collective accountability to the people as a whole."²⁴⁵

The Framers expected deliberation to occur in the Senate. Before the passage of the Seventeenth Amendment, the Senate was more insulated from the voter pressures associated with direct election, though it did face direct accountability to state legislators. Direct election of senators made the Senate a much less deliberative body.²⁴⁶ Today's negative, affective polarization makes it seem naïve to expect Senate decisions to land anywhere near the "permanent interests of the community." Indeed, the House and Senate seem more responsive to temporary passions than at any time in the last 150 years. Rather, it is executive branch agencies that embody the kind of considered, deliberative decision-making the Framers admired. Political scientist John Rohr observed 35 years ago²⁴⁷ that agencies best embody that Burkean-Madisonian notion of representation today; other scholars have made similar observations since.²⁴⁸ But

243. THE FEDERALIST NO. 10 (James Madison).

244. For a fuller explanation of this idea, one that answers the criticisms of delegation found in public choice scholarship, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); and David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97 (2000).

245. James Gray Pope, Book Review, 73 J. POL. 287, 287 (2011).

246. Of course, the Seventeenth Amendment provides for the direct election of senators, who were previously selected by state legislatures. For an exploration of the effects of the change on Senate decision-making, see Todd R. Zywicki, *The Senate and Hyper-Partisanship: Would the Constitution Look Different if the Framers Had Known that Senators Would Be Elected in Partisan Elections?*, 10 GEO. J.L. & PUB. POL'Y 375 (2012).

247. See JOHN A. ROHR, *TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE* (1986); Freeman & Spence, *supra* note 69, at 72-73.

248. Anthony Bertelli has suggested that polarization has upset the original constitutional design, one that was based on the interaction of deliberation and a strong electoral connection, and that "institutions must adapt to create legitimacy." Anthony M. Bertelli, *Federalist No. 41: Does Polarization Inhibit Coordination?*, 71 PUB. ADMIN. REV. 862 (2011). Jon Michaels argues that the administrative state replicates the original constitutional design via an administrative separation of powers. It mirrors the triangulated constitutional design by dividing power between agency leaders (political appointees), career civil servants (insulated from political pressure, and the public (whose rights are formalized in the APA), creating the mix of accountability and deliberation the Framers sought. Jon D. Michaels, *A Constitutional*

these ideas seem not to resonate with the conservative majority of today's Supreme Court.

Conclusion

For many good reasons, judicial deference to broad delegations of policymaking authority to agencies is a useful adaptation to a bigger, more complex world. The durable regimes that comprise the modern regulatory state come from a patchwork of statutes created during very brief spurts of legislative activity characterized by broad public support for action—brief periods of time when the political and partisan stars aligned to enable the creation of otherwise-elusive legislative majorities. Now the United States faces a series of complex national problems in search of national solutions, just as bitter partisan polarization is overtaking Congress and the American polity. Climate change is one such problem. Yet Congress's capacity to respond effectively to the popular will is in rapid decline, making it very unlikely to provide guidance on this important national problem. It is therefore a particularly inopportune time for the Supreme Court to constrain agencies' power and flexibility to craft policy solutions to problems within their subject matter jurisdiction. And it is particularly unfortunate that the Court bases its distrust of delegation on misunderstandings of modern congressional politics and on the theory of policymaking legitimacy woven into the constitutional design. Constraining delegation in the way the Court seems to be contemplating makes little sense in governance terms. It represents, in the words of one commentator, "a vision of administrative law's future that is precariously slanted against legislative and regulatory action."²⁴⁹ Indeed, some scholars believe that this is indeed the Court's objective.²⁵⁰ If the Court's anti-administrativism is merely an instrument for imposing limits on regulation that cannot be imposed legislatively, the good governance arguments raised here will fall on deaf ears. Nevertheless, it is important to acknowledge the ways in which the Court's anti-delegation path is misguided and harmful. The Court's choice is likely to represent an unnecessary tragedy for national climate policy and (more generally) for governance during this unusually trying moment in American political history.

Defense of the Administrative State, REGUL. REV. (Dec. 17, 2019), <https://www.theregreview.org/2019/12/17/michaels-constitutional-defense-administrative-state/> [<https://perma.cc/PCB9-KCHS>].

249. Walters, *supra* note 54, at 455.

250. *Id.*; see also Metzger, *1930s Redux*, *supra* note 54, at 3 (characterizing "[a]n attack on the national administrative state" by the Supreme Court as part of a broader anti-regulatory agenda).