"A GREAT DEAL OF DISCRETION": *BOSTOCK*, PLAIN TEXT, AND THE FUTURE OF CLIMATE JURISPRUDENCE

Grace Weatherall

Bostock v. Clayton County was marked for a place among landmark Supreme Court jurisprudence as soon as it arrived.[1] The decision protected LGBTQ+ employees from discrimination based on their sexual orientation or gender identity,[2] and LGBT activists and allies rightly celebrated it as an affirmation of basic human rights and dignity. But amidst this celebration, excitement arose from a different, surprising, quarter: climate change activists.

Before the ink had dried on *Bostock*—or, more accurately, before many readers had managed to battle through the download delay that Justice Alito's unwieldy dissent caused the Court's servers[3]—various climate scholars were already arguing that the language and reasoning that Justice Gorsuch employed in his majority decision could have major implications for climate regulation under the federal Clean Air Act (CAA).[4] Specifically, scholars posited that Gorsuch's use of progressive textualism, and his specific acknowledgement that old statutes may be used to address new problems,[5] boded well for the durability of future climate change policymaking under CAA authority.[6] Following the *Bostock* framework, climate litigants could in theory argue that the text of the CAA must allow for broad regulation of greenhouse gas as a pollutant, despite Congress's failure to address greenhouse gases or climate change directly.

Climate advocates and policymakers are certainly justified in searching for a silver bullet of legal theory to convince the Supreme Court to uphold a major CAA climate rulemaking. Climate scientists

---

[1] 140 S. Ct. 1731 (2020).

[2] The decision did not extend to employers identified as "religious organizations." *Id.* at 1754.

[3] *See* Jonathan H. Adler, *Breaking: Supreme Court Holds Title VII Prohibits Discrimination Based upon Sexual Orientation or Transgender Status*, VOLOKH CONSPIRACY (June 15, 2020, 10:36 AM) (noting that the nearly 200 page opinion, of which Justice Alito's lengthy dissent and corresponding appendices totaled over 160 pages, "appear[ed] to have crashed the Supreme Court servers"), https://perma.cc/2K2B-Z64X.

[4] 42 U.S.C. §§ 7401–671q.

[5] Or at least newly *acknowledged* problems. *Cf.* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014) (discussing the challenge that EPA faces in regulating GHGs under the CAA).

[6] *See* Ann Carlson, *What Does Today's Decision Holding That Employers Can't Discriminate Against LGBTQ Employees Have To Do with Climate Change?*, LEGAL PLANET (June 15, 2020), https://perma.cc/6W5E-U4X2; Jennifer Hijazi, *LGBT Rights Ruling: 'Potent New Precedent' on Climate?*, CLIMATEWIRE (June 18, 2020), https://perma.cc/4PJ4-VKEN.

across the globe are warning policymakers that time is running out to save the world from climate disaster,[7] and lacking climate-specific legislation, it seems more important than ever that the Environmental Protection Agency (EPA) undertake significant action under its existing authority. I have suggested elsewhere that EPA should institute National Ambient Air Quality Standards (NAAQS) for greenhouse gases (GHGs) under CAA sections 108–10, in order to activate broad federal power over state implementation plans (SIPs) for emissions reduction.[8] Similarly, several scholars have argued stridently for implementation of a GHG SIPs program under section 115.[9] Either way, regulating GHGs through SIPs represents the broadest possible approach to GHG regulation under the existing CAA,[10] but represents a difficult legal argument to make to the Supreme Court. Moreover, the Court has already demonstrated wariness of EPA attempts to address climate change under the CAA,[11] and climate litigants can expect this wariness to increase as the conservative wing of the Court grows.[12]

---

[7] *See*, *e.g.*, U.S. GLOBAL CHANGE RSCH. PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT: SUMMARY FINDINGS (2018), https://perma.cc/SH8Z-DQQC.

[8] GRACE WEATHERALL, IMMEDIATE EXECUTIVE ACTION: UNEXPLORED OPTIONS FOR ADDRESSING CLIMATE CHANGE UNDER THE EXISTING CLEAN AIR ACT 6 (2020), https://perma.cc/6DH9-S976.

[9] *See* MICHAEL BURGER ET AL., LEGAL PATHWAYS TO REDUCING GREENHOUSE GAS EMISSIONS UNDER SECTION 115 OF THE CLEAN AIR ACT 3 (2016), https://perma.cc/7J7M-7JD6.

[10] *See* Weatherall, *supra* note 8, at 6; *cf.* Howard M. Crystal et al., *Returning to Clean Air Act Fundamentals: A Renewed Call to Regulate Greenhouse Gases Under the National Ambient Air Quality Standards (NAAQS) Program*, 31 GEO. ENV'T L. REV. 233, 235 (2019) ("President Obama left office without invoking the [CAA]'s most far-reaching and important tool: the National Ambient Air Quality Standards ("NAAQS") program" for GHG regulation).

[11] *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 316 (2014) (holding, inter alia, that EPA may not subject pollutant sources to Title V regulation by virtue of their GHG emissions alone).

[12] Advocates and policymakers have particular reason to be wary in light of legal challenges to EPA's Clean Power Plan, an attempt to regulate existing stationary sources under section 111(d) of the CAA. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Dec. 22, 2015). The Clean Power Plan was never implemented. Fossil fuel interests sued EPA in 2015, claiming that EPA lacked statutory and constitutional authority for the plan, and the Supreme Court stayed the policy pending D.C. Circuit review. *See* West Virginia v. EPA, 136 S. Ct. 1000 (2016) (mem). Before the D.C. Circuit decided the matter, the Trump administration withdrew the Clean Power Plan and replaced it with the laughably ineffectual "Affordable Clean Energy" (ACE) rule. *See* Repeal of the Clean Power Plan, 84 Fed. Reg. 32,520 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60). Furthermore, the Court is slated to become more conservative following Justice Ginsburg's death and Judge Barrett's likely ascendance. *See* Maegan Vazquez & Kevin Liptak, *Trump Nominates Amy Coney Barrett as Supreme Court Justice*, CNN (Sept. 26, 2020, 9:57 PM), https://perma.cc/8WJV-XHMF.

Since a successful EPA climate rule must survive judicial review, in this article I examine whether Justice Gorsuch's *Bostock* framework could indeed aid EPA in future climate rulemaking and advocacy before the Court.

Ultimately, I conclude that *Bostock* is not the legal silver bullet that climate activists seek.[13] As attractive as the *Bostock* framework is, it cannot save climate change policymaking under the CAA from a textualist standpoint because interpretation of the word "pollutant" in the CAA, unlike "sex" in the Civil Rights Act, involves deference to an agency head. Thus, the battle for CAA GHG regulation must be fought on the fields of reasonability analysis, not textualism. And this raises a second problem for EPA. In a future climate case, the Court may reject *Chevron* deference entirely and instead utilize either the deregulatory "major questions" doctrine, or the *Schechter*-era nondelegation doctrine—and in either case, *Bostock* offers no useful tool to climate litigants. I do not argue that EPA has no chance of enacting climate policy under the CAA, nor that the agency should not attempt to do so. On the contrary, I feel strongly that EPA is morally obligated to make every effort possible to enact significant GHG regulation. I conclude, however, that future climate jurisprudence will be governed not by precise textualism, but by broad judicial and political philosophy—and that realistically, climate advocates' best bet is to pursue the appointment of as many liberal justices to the Supreme Court as possible.

I. Overview of *Bostock v. Clayton County* and Its Potential Relevance to Climate Litigation

a. *Bostock v. Clayton County*

Bostock v. Clayton County began in its life in Clayton County, Georgia, when Gerald Bostock, a county employee with an excellent work performance record,[14] joined a gay softball league and was promptly fired for "conduct unbecoming a county employee."[15] Bostock sued, alleging that the county had violated Title VII of the Civil Rights

---

[13] I concede that after Bostock, the Supreme Court is unlikely to make a so-called "elephants in mouseholes" attack on climate regulation, but I argue that this is not dispositive. See *infra* p. 18.

[14] Bostock, who worked in child welfare services for Clayton County, had previously received favorable performance evaluations from his supervisors. Mr. Bostock was ultimately given primary managerial responsibility for the Clayton County Appointed Special Advocates Program (CASA), and received awards from the national CASA organization for his excellence in service. *See* Petition for Writ of Certiorari at 6–7, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (No. 17-1618).

[15] *Id.* at 7.

Act of 1964.[16] The district court ruled against Bostock,[17] and the Eleventh Circuit agreed, holding that Title VII's prohibition of discrimination "on the basis of sex" did not apply to sexual orientation.[18] The Supreme Court reversed.[19]

Justice Gorsuch, writing for a 6-3 majority, announced in the first paragraph of his seventeen-page opinion that the phrase "discrimination . . . on the basis of . . . sex" included discrimination on the basis of sexual orientation, because sexual orientation itself depends on sex.[20] "An employer who fires an individual for being homosexual or transgender," Justice Gorsuch explained, "fires that person for traits or actions it would not have questioned in members of a different sex,"[21] and thus "[s]ex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."[22] In the following pages, Justice Gorsuch also rejected protests that Title VII cannot be used to protect LGBT employees because such a result is at odds with the "expected applications" of the law.[23] Such an application of purposivism, Gorsuch insisted, has no place in Supreme Court jurisprudence today.[24] Instead, he reasoned, the ordinary public meaning of the word "sex," and its use in the statute,[25] *requires* the Court to recognize protections for gay and transgender individuals—and it has always done so.[26] Ultimately, Gorsuch declared, the fact that the framers of the statute may not have realized that such protections existed was no reason to deny these protections now, because "the limits of the drafters' imagination supply no reason to ignore the law's demands."[27]

---

[16] *See Bostock*, 140 S. Ct. at 1738.

[17] *See* Bostock v. Clayton County, No. 1:16-CV-1460-ODE, 2017 LEXIS 217815 (N.D. Ga. July 21, 2017).

[18] *See* Bostock v. Clayton Cnty. Bd. of Comm'rs, 723 Fed. Appx. 964, 964–65 (11th Cir. 2018).

[19] *See Bostock*, 140 S. Ct. at 1754.

[20] *Id*. at 1737.

[21] *Id*.

[22] *Id*.

[23] *See id.* at 1750.

[24] *Id*. ("Rather than suggesting that the statutory language bears some other *meaning*, the employers and dissents merely suggest that, because few in 1964 expected today's *result*, we should not dare to admit that it follows ineluctably from the statutory text. When a new application emerges that is both unexpected and important, they would seemingly have us merely point out the question, refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime. That is exactly the sort of reasoning this Court has long rejected.").

[25] *See id.* at 1738 (Gorsuch notes that "[t]his Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." Gorsuch then proceeds, he says, to do just that with the phrase "discrimination…on the basis of sex.")

[26] *See id*. at 1753.

[27] *Id*. at 1737.

Moreover, Justice Gorsuch specifically forestalled potential objections on "elephants in mouseholes" grounds.[28] While Gorsuch acknowledged the late Justice Scalia's adage that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions,"[29] Gorsuch insisted that this canon "ha[d] no relevance" in the *Bostock* case, because while the policy implications of Gorsuch's interpretation are sweeping—an indisputable "elephant"—Title VII's prohibition against sex discrimination is hardly a "mousehole."[30] Instead, Gorsuch wrote, the prohibition is "written in starkly broad terms," which necessarily, according to the ordinary public meaning of the word "sex," include sexual orientation discrimination.[31]

b. Parallels to Climate Rulemaking and Litigation

The implications of *Bostock* to future climate litigation and jurisprudence are complex, but a series of parallels can be identified as follows. First, it can be argued that a prohibition against "discrimination on the basis of sex" is to LGBT employee protections under the Civil Rights Act—a statute that never mentions sexual orientation—as "air pollutant" is to GHGs under the Clean Air Act—a statute that never mentions climate change, but which empowers EPA to broadly regulate "air pollutants"[32] for the protection of the "public health and welfare."[33] In other words, both phrases explicitly identify a general issue that their statute is designed to address, and thus both should implicitly include specific aspects of that broader issue in the same way: sexual orientation discrimination is a type of sex-based discrimination (and civil rights violation), as climate change-causing GHG is a type of air pollutant (and threat to public health and welfare). Second, climate change and sexual orientation discrimination are both issues that have been neglected by most national politicians until relatively recently,[34] despite decades of advocates' efforts, and both seem ripe for regulation under an old statute that was designed to address a general issue but that did not directly acknowledge this

---

[28] *See id.* at 1753.

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

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

[31] *Id.* at 1753.

[32] *See, e.g.*, 42 U.S.C. §§ 7408–12.

[33] *Id.* § 7401(b) ("The purposes of this subchapter are—(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population . . . .").

[34] *See, e.g.*, Alan Yuhas, *American Politicians' Support of Gay Marriage: An Evolutionary History*, GUARDIAN (Mar. 26, 2013, 12:34 PM), https://perma.cc/E4RY-SELP; Susan Matthews, *Climate Change Has Finally Broken Through*, SLATE (Nov. 25, 2019, 5:40 AM), https://perma.cc/M8QA-QKUR.

specific problem. Third, Gorsuch's choice in *Bostock* to brush aside "elephants in mouseholes" concerns, despite the broad policy implications of his holding, is encouraging to climate activists because the Supreme Court has made clear in past climate cases that it considers broad GHG regulation programs to constitute an elephantine effect on national industry.[35]

c. Overview of Relevant Climate Jurisprudence

For those hoping for a friendly judicial reception to climate change regulation, Justice Gorsuch's *Bostock* arguments are tantalizing. I am convinced, however, that the series of parallels outlined above will not, alone, be enough to ensure the protection of an ambitious Clean Air Act GHG regulation scheme. In order to understand why not, we must first understand the history of the three Supreme Court cases that have addressed GHG regulation under the CAA thus far: *Massachusetts v. EPA* (*Mass. v. EPA*),[36] *American Electric Power Co. v. Connecticut* (*AEP v. Connecticut*),[37] and *Utility Air Regulatory Group v. EPA* (*UARG v. EPA*).[38]

i. Massachusetts v. EPA *and the Origins of Greenhouse Gas Regulation Under the Clean Air Act*

The Supreme Court first addressed GHG regulation under the CAA in 2007, in *Mass. v. EPA*. Today, this case represents the basis for EPA regulation of GHGs as pollutants. *Mass. v. EPA* began in 2003, when EPA made an official determination declaring that it lacked authority under the CAA to regulate GHGs as pollutants in the context of climate change.[39] A coalition of states, cities, and environmental organizations brought suit, arguing that section 202 of the CAA—requiring EPA to set emissions standards for "any air pollutant" produced by vehicles—included GHGs.[40] The Supreme Court agreed, finding that GHGs "fit well within the Clean Air Act's capacious definition of 'air pollutant.'"[41] Accordingly, in 2009, EPA under the newly-elected President Obama made an "endangerment finding"

---

[35] *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 303 (2014) (holding that to expand the CAA Title V permitting program beyond "a relative handful of large sources" would constitute "an enormous and transformative expansion in EPA's regulatory authority").

[36] 549 U.S. 497 (2007).

[37] 564 U.S. 410 (2011).

[38] 573 U.S. 302 (2014).

[39] *See* Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Sept. 8, 2003).

[40] *See* 549 U.S. at 511–14.

[41] *Id.* at 532.

officially establishing that the six primary "well-mixed" greenhouse gases together constituted a singular "air pollutant" under section 202.[42]

ii. AEP v. Connecticut*, Stationary Source Regulation, and the Potential for Future Rulemaking*

AEP v. Connecticut, decided in 2011, subsequently expanded EPA's ability to regulate GHGs as an air pollutant beyond section 202 (vehicle regulation) to include subsections 111(b) and (d) (stationary source regulation). *AEP v. Connecticut* began when an alliance of states and environmental interests sued a group of energy companies, attempting to use federal common law authority to force the companies to reduce GHG emissions from their power plants.[43] The Supreme Court dismissed the case.[44] Writing for a 6-0 majority,[45] Justice Ginsburg held that the CAA had foreclosed common law litigation on matters of interstate air pollution, because the Act "speaks directly" on this issue[46]—and after *Mass. v. EPA*, it was "plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act."[47] Significantly, in addition to confirming EPA GHG regulatory authority under sections 202 and 111, Justice Ginsburg also left the door open for GHG rulemaking under other sections of the CAA, including the NAAQS program.[48] "The Act," she wrote, "provides multiple avenues for enforcement, [and i]f EPA does not set emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter."[49]

---

[42] *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,516 (Dec. 15, 2009).

[43] The district court had dismissed the plaintiffs' suit, arguing that it presented a nonjusticiable political question. *See Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 273 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309, 393 (2d Cir. 2009).

[44] *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 429 (2011).

[45] Justices Alito, joined by Justice Thomas, wrote an opinion concurring in part and concurring in the judgment, in which both justices made clear that they were assuming that *Mass. v. EPA* had been decided correctly only for the sake of argument, because no party had contended that matter in *AEP v. Connecticut*. *See* 564 U.S. at 430 (Alito, J., concurring in part and concurring in the judgment). Justice Sotomayor, who had previously heard the case as a Second Circuit judge, recused herself. *See id.* at 429.

[46] *Id.* at 424.

[47] *Id.*

[48] *Id.*

[49] *Id* at 425. Section 307 of the Clean Air Act allows states and private parties to petition for review of EPA actions taken under sections 108–12, section 202, or any other applicable national program in the D.C. Circuit. *See* 42 U.S.C. § 7607(b). In *AEP v. Connecticut*, Justice Ginsburg held that section 307 displaces federal common law litigation whether or not "EPA actually exercises its regulatory authority" by setting emissions standards for a particular source or pollutant, because "[t]he relevant

iii. UARG v. EPA *and the GHG Regulation—Textualism Mismatch*

Mass. v. EPA and *AEP* together constitute an essential foundation to federal GHG regulation, but *UARG v. EPA*, decided in 2014, provides the most relevant precedent for future attempts at ambitious GHG regulatory policy. *UARG* began in 2010, when EPA, reacting to *Mass. v. EPA,* determined that it must regulate GHG emissions under the "prevention of significant deterioration"[50] (PSD) and Title V programs, which require emissions permits for "major sources."[51] Per the statute, a "major source" is any source emitting 250 tons of "any air pollutant" each year[52]—but many sources emit GHGs in such vast amounts that millions of nontraditional sources, including residences, would count as "major sources" if GHGs were considered "air pollutants" under these programs.[53] Seeking to avoid unmanageable permitting responsibilities, EPA designed the "Tailoring Rule," which specified that sources would be considered "major" due to their GHG emissions alone only if they emitted at least 100,000 tons of GHGs each year.[54]

Energy interests challenged the Tailoring Rule in the D.C. Circuit, and the Supreme Court struck it down.[55] Writing for a deeply divided plurality which only Chief Justice Roberts and Justice Kennedy

---

question for purposes of displacement is 'whether the field has been occupied, not whether it has been occupied in a particular manner.'" 564 U.S. at 426 (quoting City of Milwaukee v. Illinois, 451 U.S. 304, 324 (1981)). "The critical point," Justice Ginsburg noted, "is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants . . . ." 564 U.S. at 426.

[50] Under the NAAQS program, EPA sets primary and secondary standards for the "criteria pollutants" (currently lead, particulate matter, ground-level ozone, carbon monoxide, sulfur dioxide, and nitrogen dioxide), *see Criteria Air Pollutants*, EPA, https://perma.cc/YYQ7-D3T7 (last visited Oct. 13, 2020), and requires each state to meet that standard. 42 U.S.C. § 7407(a). EPA also monitors which areas of the country are in "attainment" for these standards, and under the authority of the CAA, imposes certain permitting requirements for sources in "nonattainment zones," *see id.* §§ 7407(d)(i), 7502, and for sources in "attainment zones. *See id.* § 7407(d)(ii). The attainment zone program is known as the "prevention of significant deterioration, or "PSD" program. *See New Source Review (NSR) Permitting: Prevention of Significant Deterioration Basic Information,* EPA, https://perma.cc/PL8X-YRW6 (last visited Oct. 13, 2020).

[51] *See* Action to Ensure Authority to Implement Title V Permitting Programs Under the Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 82,254 (Dec. 30, 2010).

[52] 42 U.S.C. § 7479(1).

[53] *See* Action to Ensure Authority to Implement Title V Permitting Programs Under the Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 82,254.

[54] *Id.* at 82,256.

[55] *See* Coal. for Resp. Regul., Inc. v. EPA, 684 F.3d 102, 149 (D.C. Cir. 2012), *rev'd sub nom.* Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014).

joined in full,[56] Justice Scalia held that EPA had been wrong to "tailor" a statutory provision this way.[57] In writing a rule that purported to recognize GHG sources as "major" for purposes of regulation only if they emitted at least 100,000 tons per year, Scalia wrote, EPA had illegally "revise[d] statutory terms."[58] The only solution to the legal and practical problem at hand, Scalia held, was to read an implicit exemption into the phrase "any air pollutant" in the context of the PSD and Title V programs.[59] Thus, according to Justice Scalia, GHGs are officially *not* "air pollutants" under sections 165, 169, or 171–73 of the CAA.[60]

Justice Breyer, meanwhile, argued in a partial concurrence that the Court had misplaced its implicit exemption. While Scalia had decided that the term "any air pollutant" must be read to exclude "non-traditional" pollutants like GHGs, Breyer argued that it would instead be possible to read the term "any major source" to exclude those sources, like private residences, which are unsuited to Title V permitting.[61]

Finally, Justice Alito argued in a separate partial concurrence that EPA should not be allowed to regulate GHGs under the CAA at all.[62] Alito argued that GHGs are fundamentally unsuited to regulation under the Clean Air Act, and that while EPA had attempted to gloss over the problems of GHG regulation under the CAA by arguing that the Act grants the agency "a great deal of discretion," ultimately "[t]hat is not what the Clean Air Act contemplates."[63]

---

[56] Justices Thomas and Alito joined in Parts I, II-A, and II-B-1, and Thomas joined Alito on an opinion concurring in part and dissenting in part.
Justices Ginsburg, Breyer, Sotomayor, and Kagan joined as to Part II-B-2 (holding that EPA could require PSD and Title V permitting for "anyway" sources—sources which were triggered in to the permitting program because they emitted at 250 tons per year of a more "traditional" pollutants). Justice Breyer filed an opinion concurring in part and dissenting in part, in which Justices Ginsburg, Sotomayor, and Kagan, joined (arguing that the PSD and Title V programs could still apply to GHGs if the court read an implicit exception into the phrase "any major source", rather than the phrase "any air pollutant.") *See infra* pp. 12–13.

[57] *See* 573 U.S. at 328.

[58] *See id*. at 327.

[59] *See id*. at 316 ("The Court of Appeals reasoned by way of a flawed syllogism: Under *Massachusetts*, the general, Act-wide definition of "air pollutant" includes greenhouse gases; the Act requires permits for major emitters of "any air pollutant"; therefore, the Act requires permits for major emitters of greenhouse gases. The conclusion follows from the premises only if the air pollutants referred to in the permit-requiring provisions (the minor premise) are the same air pollutants encompassed by the Act-wide definition as interpreted in *Massachusetts* (the major premise). Yet no one—least of all EPA—endorses that proposition, and it is obviously untenable.")

[60] These sections, 42 U.S.C §§ 7475, 7479, and 7501–03 respectively, outline the PSD, NAZ, and general Title V permitting programs.

[61] *See* 573 U.S. at 338–39.

[62] *See id*. at 344. Justice Thomas joined Justice Alito's partial concurrence. *Id.* at 343.

[63] *Id*. at 349–50.

This, then, is the state of Supreme Court climate jurisprudence after ten years of EPA GHG regulation and climate cases before the Court. After *UARG*, the Court's conservative wing has made its suspicion of ambitious GHG regulation clear—but the door is not closed to climate rulemaking entirely. Would-be climate policymakers and litigants, anticipating a possible Biden presidency, will keep all this in mind as they seek a successful legal framework for ambitious policy.

II. Textualism, Deference, and the Nondelegation Doctrine: What *Bostock* Does and Does Not Mean for the Future of Climate Jurisprudence

Based on the precedent outlined above, it appears that the *Bostock* textualist approach cannot be used as a template for climate litigation. This is true both because the Court has already held that "any air pollutant" does not actually mean "any," and because interpretation of the term "pollutant" in the context of the CAA fundamentally involves relative deference to the EPA administrator. In theory, litigants could argue that the plain text of the CAA mandates full deference to the EPA Administrator in identifying those pollutants that endanger public health or welfare and are thus subject to CAA regulation. Realistically, however, the battle for climate regulation will depend not on textualism, but on the broader questions of reasonability and deference. And unfortunately for EPA, this Court is likely to forego *Chevron* altogether and dismiss a climate rule either on major questions grounds, or, in a worst-case-scenario situation, through the revival of the nondelegation doctrine. This unfortunate possibility is now more likely than ever in light of Justice Ginsburg's death and likely replacement with conservative judge Amy Coney Barrett.[64]

A. The Textualist Mismatch Between Title VII's "on the Basis of Sex" and the Clean Air Act's "Any Air Pollutant"

Despite *Bostock*'s progressive textualist appeal, it is unlikely that the *Bostock* framework will aid a future EPA in establishing GHGs as "any air pollutant" throughout the Clean Air Act. As noted above, Justice Gorsuch in *Bostock* put forth a compelling argument for the inclusion of an implicit, specific issue within an explicit, general statutory term and mandate. The Civil Rights Act's prohibition against "discrimination on the basis of sex", Gorsuch insisted, must include a prohibition against sexual orientation discrimination.[65] It is tempting

[64] *See* Vazquez & Liptak, *supra* note 12.
[65] *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

to conclude by the same logic that the CAA's reference to "any air pollutant" must include GHGs—but this does not necessarily follow from likely Supreme Court reasoning, for two reasons.

First, it is important to note that *Bostock* itself overturned no Supreme Court precedent—instead, it announced the existence of a previously unrecognized inherent meaning in the phrase "discrimination…on the basis of sex."[66] By contrast, the Supreme Court has already addressed the question of whether the term "air pollutant" could include GHGs, and purports to have settled the matter under more than one section of the CAA. According to *Mass. v. EPA* and *AEP v. Connecticut*, GHGs *are* air pollutants under sections 202 and 111.[67] But according to *UARG*, GHGs *are not* air pollutants under section 169.[68] It is already clear, then, that the Court does not believe that the phrase "any air pollutant" must *always* include GHGs.

Second, both sides of the ideological spectrum have already exhibited aversion to a plain text approach in the context of climate change. In *UARG*, Justice Scalia and Justice Breyer's majority and dissenting opinions are opposite in function but identical in form: both engage in a textualist approach of a sort, yet explicitly reject the bounds of plain meaning. Each Justice notes that the term "any" need not mean "any in the universe,"[69] and each acknowledges the need to read an

---

[66] The full text in Title VII of the 1964 Civil Rights Act is as follows: "It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(b). In *Bostock*, Justice Gorsuch concluded that this included this inherently included discrimination on the basis of sexual orientation. *See* 140 S. Ct. at 1737 (". . . [In] Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin . . . . An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.")

[67] *See* Massachusetts v. EPA, 549 U.S. 497, 532 (2007) ("Because greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant,' we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles."); Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 (2011) ("*Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act. And we think it equally plain that the Act 'speaks directly' to emissions of carbon dioxide from the defendants' plants [regulated under § 111].")

[68] *See UARG*, 573 U.S. at 333–34 ("[EPA] may not treat greenhouse gases as a pollutant for purposes of defining a "major emitting facility" (or a "modification" thereof) in the PSD context or a "major source" in the Title V context.") Of course, *UARG* is only a plurality opinion, but the Court is nonetheless likely to treat the decision as controlling precedent in a future case.

[69] *Id*. at 337 (Breyer, J., concurring in part and dissenting in part) ("I agree with the Court that the word 'any,' when used in a statute, does not normally mean "any in the universe.")

implicit exemption into the text—accordingly, Scalia proposes to read the relevant line as "any air pollutant *except greenhouse gases*,"[70] and Breyer proposes "any major source *except non-traditional sources*."[71] In advancing a plain text approach to support GHG regulation throughout the CAA, litigants would need to convince the Supreme Court to both overturn decided precedent and abandon longstanding methods of interpretation. Neither proposition is likely to succeed.

B. A Textualist Obligation to Afford Deference?

Certainly, the status of greenhouse gases as air pollutants remains unsettled under several thus-far unlitigated sections of the Clean Air Act—including, notably, the NAAQS program. The NAAQS program empowers the EPA Administrator to identify a list of ambient air pollutants which she feels may "endanger public health or welfare"[72] and develop national standards for these pollutants, and it provides an excellent example of why the Supreme Court has good reason to eschew a plain text approach in interpreting "any air pollutant" under the CAA. Despite Justice Alito's protestations, the CAA does indeed grant EPA "a great deal of discretion"[73]—in particular, regarding which substances to regulate as pollutants. The Administrator's choice of pollutant under the NAAQS program is of course reviewable in theory, but thus far the Court has essentially granted EPA free reign in identifying criteria

---

[70] *See id.* at 320 ("In sum, there is no insuperable textual barrier to EPA's interpreting "any air pollutant" in the permitting triggers of PSD and Title V to encompass only pollutants emitted in quantities that enable them to be sensibly regulated at the statutory thresholds, and to exclude those atypical pollutants that, like greenhouse gases, are emitted in such vast quantities that their inclusion would radically transform those programs and render them unworkable as written.").

[71] *See id.* at 339 (Breyer, J., concurring in part and dissenting in part) ("The implicit exception I propose reads almost word for word the same as the Court's, except that the location of the exception has shifted…I would simply move the implicit exception…so that it applies to "source" rather than "air pollutant": "any *source* with the potential to emit two hundred fifty tons per year or more of any air pollutant *except for those sources, such as those emitting unmanageably small amounts of greenhouse gases, with respect to which regulation at that threshold would be impractical or absurd or would sweep in smaller sources that Congress did not mean to cover*.")

[72] *Id.* at § 7408(a)(1)(A).

[73] *See UARG*, 573 U.S. at 349–50 (Breyer, J., dissenting).

pollutants[74]—cabined by the traditional "reasonableness" metric for evaluating agency discretion.[75]

Arguably, this means that despite the clear failure of a plain text approach to defining the term "any air pollutant," there may still be hope for a plain text argument in *support of deference* to the EPA Administrator. The NAAQS program demands that the Administrator be allowed to exercise her "judgement" in identifying and listing criteria pollutants.[76] Thus climate advocates could adopt a sort of *Bostock* framework and argue that the CAA has always given EPA the ability to regulate any substance which can reasonably be said to endanger health or welfare, regardless of cost or regulatory reach.[77] I have argued elsewhere that under the NAAQS program at least, EPA is clearly authorized to regulate GHGs as an air pollutant, in part because of the broad discretion granted to the Administrator in the stark language of the CAA.[78] Under this theory, the Court would be required to accept EPA's identification of GHGs as a pollutant, and subsequently engage in the traditional reasonability and arbitrary and capriciousness analysis of whatever the resulting rule may be.

C. Major Questions, New Tricks, and the Court's Evolution Away from Deference

As noted above, while an intellectually honest textualist approach may in theory require the Court to grant EPA the discretion to regulate GHGs as a pollutant throughout the CAA, in practice it is unlikely that defending a massive GHG regulatory program will be as simple as a text-based argument for EPA discretion. Furthermore, this Court is likely to forego a *Chevron* reasonability analysis altogether, and instead either invoke its "major questions" doctrine to bar EPA's

---

[74] EPA listed the first six criteria pollutants in 1971, and noted the power of the Administrator's discretion in so doing. *See* National Primary and Secondary Ambient Air Standards, 36 Fed. Reg. 8186 (Apr. 30, 1971) (to be codified at 42 C.F.R. pt. 410). Since that year, EPA has faced no relevant challenges to its authority to regulate any of the original six.

[75] EPA policies made through notice and comment rulemaking are subject to a *Chevron* reasonableness and APA arbitrary and capriciousness analysis—the two of which, in practice, amount to essentially the same thing.

[76] 42 U.S.C. § 7408(a)(1)(A).

[77] Climate litigants could even use this reasoning to argue that once greenhouse gases are established as a pollutant under one section of the Clean Air Act, EPA must retain the ability under any section of the Act—including those sections which have been previously foreclosed, as in *UARG*. If EPA were to successfully list GHGs as a criteria pollutant, however, the agency would have no need of regulating GHGs under other sections of the Act, and keeping in mind that the Court is loath to overturn existing precedent, EPA would likely wish to avoid this course.

[78] *See* Weatherall, *supra* note 8.

regulatory authority over GHGs for lack of a "clear statement,"[79] or use a major climate rule as a vehicle to revisit the *Schechter*-era nondelegation doctrine.[80]

First, the Supreme Court could invoke its "major questions" jurisprudence, used to great effect in *UARG*,[81] and declare that EPA cannot, for example, regulate GHGs as a pollutant under the NAAQS program without a "clear statement" from Congress authorizing it to do so—because GHGs are not "conventional" pollutants,[82] and because any major climate rule would surely have a transformative effect on industry. Justice Scalia, of course, is no longer on the Court, but other justices seem eager to pick up his mantle on this point.[83] Justice Kavanaugh, for instance, has already demonstrated his fondness for the major questions principle on environmental and administrative law issues in particular.[84] In oral argument for *West Virginia et al. v. EPA*, the 2016 D.C. Circuit case regarding the legality of the Obama EPA's ambitious Clean Power Plan, then-Judge Kavanaugh pressed

---

[79] In addition to its textualist reasons for rejecting the Tailoring Rule, the *UARG* Court ostensibly held that EPA's rule was "unreasonable." 573 U.S. at 324. In fact, however, it would be more accurate to say that the Court adhered to its major questions analysis and avoided *Chevron* entirely in holding that "EPA's interpretation is . . . unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." *Id*.

[80] *See generally Nondelegation Doctrine*, CORNELL L. SCH. LEGAL INFO. INST. (2020), https://perma.cc/87C2-WVMG; A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[81] *See* 573 U.S. at 324 ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" (citation omitted)).

[82] *See id*. at 310 (distinguishing GHGs from "conventional" pollutants, which EPA has traditionally regulated under the PSD and Title V programs-–such as the six currently listed criteria pollutants).

[83] *See*, *e.g.*, Justin Walker, *The Kavanaugh Court and the Schechter-to-Chevron Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L. REV. 923 (2020). In this article, the recently-appointed D.C. Circuit judge Justin Walker observes past judicial trends to predict that Justice Kavanaugh will lead a Supreme Court movement away from *Chevron* deference and back toward a *Schechter*-era non-delegation doctrine, thereby limiting agencies' abilities to interpret statutes and make effective policy. Judge Walker, a staunch conservative, is certainly not unbiased, but his account of Justice Kavanaugh's eagerness to move away from Chevron is convincing.

[84] *See*, *e.g.*, Jeremy P. Jacobs & Pamela King, *Kavanaugh Takes Cues from Scalia in Groundwater Ruling*, E&E NEWS (Apr. 24, 2020), https://perma.cc/RQD4-GRNX. It is also worth noting that, with the death of Justice Ginsburg and the likely ascendancy of Judge Amy Coney Barrett, Justice Kavanaugh may be poised to become a more conservative Court's new swing justice. *See, e.g.*, Greg Stohr, *Kavanaugh Emerges as Man-in-the-Middle With Supreme Court Set to Shift Right,* BLOOMBERG (Sep. 23, 2020), https://perma.cc/N7P6-GLBG.

government counsel on major questions grounds.[85] It is not difficult to imagine that Kavanaugh and like-minded justices would be swift to invoke the "major questions" rule in a major climate case to bar EPA from regulating GHGs as a pollutant under major sections of the CAA.

More troubling still, the Court's conservative wing has recently been sending signals that it is eager to move away from the *Chevron* tradition altogether in favor of the nondelegation doctrine of the *Schechter* era, which could require Congress to outline a highly specific "intelligible principle" before agencies may develop regulatory schemes.[86] This shift was most recently demonstrated in *Gundy v. United States*,[87] a case addressing whether the Sex Offender Registration and Notification Act, in stating that the Attorney General has "the authority to specify the applicability of the requirements of [the Act] to sex offenders convicted before [its] enactment," fails to establish an intelligible principle cabining the Attorney General's authority and thus violates the nondelegation doctrine.[88] Although Justice Kagan's plurality opinion did not alter Supreme Court precedent on the matter, the conservatives in dissent made their displeasure with this result clear.[89] Indeed, those heralding the *Bostock* decision as a harbinger of friendly climate jurisprudence may find reason to be concerned with the fact that Justice Gorsuch himself wrote a dissenting *Gundy* opinion, joined by the Chief Justice, Justice Kavanaugh, and Justice Thomas. Specifically, Gorsuch argued that *Gundy* would have been an opportunity to revisit the nondelegation doctrine, because the statute in question inappropriately "hand[ed] off to the nation's chief prosecutor the power to write his own criminal code."[90] It is not difficult to imagine that Justice Gorsuch might feel the same way about the argument that the CAA grants EPA the power to identify and regulate any pollutants that endanger health or welfare in any way. And Justice Gorsuch would

---

[85] *See, e.g.*, *Transcript of Oral Argument at 44–45, 211–12, 218–19,* West Virginia v. EPA, No. 15-1363, 2016 U.S. App. LEXIS 29593 (D.C. Cir. Sept. 17, 2019) (per curiam).

[86] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[87] 139 S. Ct. 2116 (2019).

[88] *Id*. at 2122–23.

[89] Justices Ginsburg, Breyer, and Sotomayor joined Justice Kagan's plurality opinion. *See id*. at 2120. Justice Gorsuch wrote a dissenting opinion in which Justices Roberts, Kavanaugh, and Thomas joined, arguing that the text of the Sex Offender Registration and Notification Act "purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens," and thus must be overturned on nondelegation doctrine grounds. *Id*. at 2131 (Gorsuch, J., dissenting). Justice Alito wrote a concurrence stating that he "[could] not say that the statute lack[ed] a discernable standard that is adequate under the approach this Court has taken for many years," but that he would be willing to reconsider the nondelegation approach in another case if a majority of justices were willing to join such an effort. *See id*. at 2130 (Alito, J., concurring).

[90] *Id*. at 2148 (Gorsuch, J., dissenting).

likely find particular reason to be concerned if EPA applied this reasoning to regulation of GHGs, because GHGs are well-mixed, globally dispersed, dangerous only on an international scale, and impossible to effectively control without a significant shift in the American energy industry.[91]

In response to this concern, climate advocates may cite the second significant *Bostock* finding: the idea that old statutes can perform new tricks, regardless of their framers' intent.[92] Certainly, this holding may help to defeat an "elephants in mouseholes" challenge, following Justice Gorsuch's *Bostock* reasoning, because while deference to EPA in regulating GHGs as pollutants is certainly an elephant, the text of the Clean Air Act grants EPA the authority to identify and regulate pollutants that endanger public health and welfare—and thus no "mousehole" exists.[93] Ultimately, however, I fear that in light of the Court's shift toward the major questions and nondelegation doctrines,[94] this is but a hollow victory.

V. Conclusion

Having considered the future of climate jurisprudence in light of *Bostock*, relevant climate cases, and the Court's current trend toward nondelegation, I conclude that the problem with climate advocates' search for a silver bullet may not be that no such bullet exists, but rather that the Court is unlikely to acknowledge one. It may be true, in theory, that the text of the Clean Air Act demands deference to the EPA Administrator in identifying pollutants for regulation, but the Court may refuse to acknowledge this, either by citing major questions, or by announcing a revival of the intelligible principle requirement. Ultimately, I do not suggest that climate advocates and a theoretical Biden EPA should cease regulatory attempts under the Clean Air Act. For one thing, I believe that the Act provides a clear mandate for EPA action in identifying pollutants which endanger public health or welfare, and regulating emissions of those pollutants. And despite the challenges, I do not think it is impossible that Justice Roberts or

---

[91] *See* Weatherall, supra note 8, at 16. Note, however, that the energy industry's shift is already underway, driven by market forces and state regulations. *See*, *e.g.*, Emily Kaldjian & Priya Barua, *The US Underwent a Quiet Clean Energy Revolution Last Year*, WORLD RES. INST. (Jan. 23, 2019), https://perma.cc/5TXD-3Q8Y.

[92] *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020) ("[T]he limits of the drafters' imagination supply no reason to ignore the law's demands.").

[93] *See id.* at 1753 ("We can't deny that today's holding—that employers are prohibited from firing employees on the basis of homosexuality or transgender status—is an elephant. But where's the mousehole?").

[94] In the end, the Court may not need to announce the resurrection of Schechter, because the major questions doctrine, and its demand for a "clear statement," is arguably "non-delegation-lite" in effect.

Gorsuch could be persuaded to support a new significant climate rulemaking. In the end, however, it is clear that climate advocates' best bet is not to craft a brilliantly reasoned rulemaking to impress this Court, but instead to elect a President who will appoint one or two climate-friendly justices--and perhaps, given recent events on the Court, even to initiate a Court packing plan. Time, after all, is running out.