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Half a Century of Supreme Court Clean Air Act Interpretation: Purposivism, Textualism, Dynamism, and Activism

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Half a Century of Supreme Court Clean Air Act Interpretation: Purposivism, Textualism, Dynamism, and Activism

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I. Introduction

Justice Antonin Scalia’s death raised growing anxiety about ideological judging to a fever pitch. Congressional Republicans refused to schedule hearings for President Obama’s nominee to fill the vacated seat, Merrick Garland, lest a liberal judicial majority emerge.1 The Democrats retaliated with an attempted filibuster designed to stop the confirmation of President Trump’s nominee, Neil Gorsuch, which was thwarted by a change in Senate rules.2

Public concern about Supreme Court nominees reflects a perception that a Justice’s political leaning affects constitutional rulings and usually focuses on the abortion rights issue. Most scholarship addressing the effect of Supreme Court Justices’ ideology on their decision-making likewise focuses on rulings interpreting the Constitution.3


Many opponents of Neil Gorsuch’s nomination, however, suggested that his political leanings influence his statutory interpretation and that interpretation of statutes can have a huge effect on the law. In particular, campaigners against the Gorsuch nomination focused on the so-called “freezing trucker” case, in which Judge Gorsuch dissented from a 10th Circuit ruling affirming an award of damages to a trucker who was fired for disobeying an order to drive his unsafe rig or remain in an unheated cab in subzero temperatures. His opponents argued, in effect, that Gorsuch’s conclusion that the whistleblower provision of the Surface Transportation Assistance Act did not forbid firing the trucker reflected a bias against workers. Senators at his
confirmation hearing also relied heavily on his statutory rulings in arguing that Judge Gorsuch favors corporations over workers across a broad range of cases.\(^7\)

The effect of judicial ideology on the Supreme Court’s statutory interpretation, however, has received less systematic study than questions about ideology’s role in constitutional law cases.\(^8\) When the Justices interpret statutes, do they simply enact their political views into law under the guise of a judicial opinion, so that party affiliation rather than legal considerations explain what the Court does?\(^9\) Or should we view the Supreme Court as

\(^7\) See, e.g., Nomination, supra note 4, at 1–4 (questions for the record of Sen. Al Franken, S. Comm. on the Judiciary) (questioning Gorsuch about pro-big business holdings in an antitrust case); Nomination, supra note 4 (questions for the record of Sen. Patrick Leahy, S. Comm. on the Judiciary) (questioning Gorsuch on a narrow interpretation of statutory protection against a hostile work environment).


\(^9\) See Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model, 65 (1993) (providing what is generally understood to be the canonical statement of the relationship between judicial ideological preferences and voting patterns); see also Segal & Spaeth, supra note 3. Some political scientists have modeled empirical support for the influence of both legal and
obeying statutory language, which often proves more specific and more recent than constitutional language? And how does the Court’s approach square with democracy and the rule of law? Does the Court reflect the will of the Congress that enacted the statute? Or is the Court perhaps performing a different democratic function by updating the statute to reflect contemporary political preferences and/or address new problems?10 And, perhaps most importantly, should the Court be doing things differently? If so, how? These questions prove difficult to study, because they require a combination of political science, an understanding of the statutes being interpreted, and familiarity with approaches to statutory interpretation.

This Article addresses these questions by studying the history of the Supreme Court’s interpretation of the Clean Air Act (CAA),11 which now goes back almost half a century. Many scholars have argued that the Court has shifted from an approach to statutory interpretation that relied heavily on purposivism—the custom of giving statutory goals weight in interpreting statutes—toward one that relies more heavily on textualism during this period.12 At the same time, proponents of dynamic statutory interpretation have argued that courts, in many cases, do not so much excavate a statute’s meaning as adapt a statute to contemporary circumstances.13

The CAA provides a useful prism for evaluating these accounts descriptively and normatively. The Court has taken a keen interest in ideological factors in U.S. Supreme Court decision-making. See Michael A. Bailey & Forrest Maltzman, The Constrained Court 47–63 (2011); Lee Epstein, William A. Landes & Richard A. Posner, The Behavior of Federal Judges 25–64 (2013) (finding a substantial effect of ideological preferences on decision-making—particularly at the U.S. Supreme Court—while also noting that a variety of legal and professional factors may also affect judicial behavior); Mark J. Richards & Herbert M. Kritzer, Jurisprudential Regimes in Supreme Court Decision Making, 96 Am. Pol. Sci. Rev. 305 (2002).

10. See William N. Eskridge, Jr., Dynamic Statutory Interpretation (1994).
12. See infra note 20 and accompanying text.
13. See Eskridge, supra note 10, at 9–10 (arguing that as a statute ages the legislature’s original intent loses relevance and courts adapt the statute to changed circumstances).
in the CAA.\textsuperscript{14} Indeed, its interest in recent years has led it to review some cases that generated neither circuit splits nor, arguably, important national issues.\textsuperscript{15} Over the years, the Court has decided 20 cases interpreting the CAA, a body of case law sufficiently large to ground a focused study of approaches to statutory interpretation, but not so huge that it defies coherent qualitative study. In recent years, the Court has issued a series of rulings addressing EPA’s attempt to grapple with climate disruption, the most important new environmental issue of the last fifteen years.\textsuperscript{16} These recent decisions provide a case study in dynamic statutory interpretation, as the Court has struggled to adapt the CAA to an important problem not fully anticipated when Congress amended the CAA in 1990, let alone when Congress first enacted it in its modern form in 1970.\textsuperscript{17} At the same time, we have some older cases that establish a baseline which facilitates inquiry into whether the shifts that have occurred over time reflect new politics, new problems, or new judicial philosophies.\textsuperscript{18}

Focusing on the CAA provides an opportunity to discuss the role of political shifts in attitudes toward the statute itself in Supreme Court adjudication. Specifically, elite opinion and political opinion have shifted in ways that matter to CAA

\textsuperscript{14} See infra notes 15, 16, 25, 26 and accompanying text.

\textsuperscript{15} See Michigan v. EPA, 135 S. Ct. 2699, 2706–07 (2015) (reviewing a single ruling about whether EPA must consider cost in deciding whether regulation of an electric utility’s hazardous air pollution is appropriate and necessary, when it has already considered cost in crafting the regulation); Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 308, 313 (2014) (reviewing a single ruling about reducing the applicability of general CAA program to greenhouse gases even when more specific standards will likely prove more important).


\textsuperscript{18} See KECK, supra note 3, at 11 (noting that ideas affect judicial behavior).
interpretation since Congress last amended the statute in 1990.\(^{19}\) One can compare shifts of attitude in judicial opinions with changes in elite and political opinion to develop a specific account of dynamic statutory interpretation’s response to political developments.

Part II provides a basic account of the CAA and its evolution to provide a grounding for understanding the particular cases to come. But the CAA is so vast and the problems that arise under it so varied that the presentation of many statutory details must wait until the cases implicating them become the focus of analysis. This section also discusses the evolution of political and elite attitudes toward the CAA in order to provide a basis for the evaluation of dynamic statutory interpretation to follow.

Part III develops a baseline in the interpretation of the statute from 1970 to 2004. This Part develops the concepts of purposivism and textualism in this context and examines how they play out in the case law of this period. The standard accounts of statutory interpretation suggest that the Supreme Court’s approach shifted from a heavy reliance on purpose to a much heavier reliance on text.\(^{20}\) This section tests this account in the CAA context and uncovers a surprise—judicial pursuit of goals unmoored from text and purpose in the 1980s, which delayed the shift to textualism in the CAA context.

Part IV argues that more recent Supreme Court CAA cases evince a shift to dynamic statutory interpretation, but in two different senses. The Court’s dynamic interpretation in some cases adapts the CAA to a new problem, that of global climate disruption. In other cases, the Court’s dynamic interpretation adapts the statute to elite political opinion favoring what Cass Sunstein calls the “cost-benefit state”—a state devoted to cost-benefit balancing—or to political opinion opposing regulation.\(^{21}\)

Part V evaluates the shift to dynamic statutory interpretation, which one sees in the previous decade. It argues that the problem

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\(^{20}\) See, e.g., John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 7 (2001) (stating that “near the close of the twentieth century . . . the ‘new textualism’ called . . . strong purposivism” into question).

many judges associate with purposivism—its supposed tendency to foster judicial opinions reflecting judges' political views—has proven more pervasive in the recent era of dynamic statutory interpretation than in the 1970s, when the Court regularly gave substantial weight to statutory purpose. It examines the question of how best to carry out statutory adaptation in a way that does not undermine democracy and the rule of law; in particular, considering what role elite views should play in that adaptation.

II. The Clean Air Act

A. Key Statutory Features

Congress enacted the modern CAA in 1970 in response to an environmental crisis that led to mass demonstrations and a broad consensus favoring strict environmental protection. The CAA’s stated goal is to protect public health and the environment, rather than to achieve a balance between environmental protection and competing considerations.

The CAA pursues this goal by establishing a comprehensive program of pollution control. It requires EPA to list pollutants that endanger public health and the environment. For ubiquitous pollutants, called “criteria pollutants,” the CAA operationalizes its goals by requiring EPA to promulgate and periodically revise national ambient air quality standards (NAAQS), set at levels that protect public health and the environment with an adequate margin of safety.


23. See 42 U.S.C. § 7401(b)(1) (2012). This paragraph defines the purpose as “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and the productive capacity of its population.” Id. It expresses the view that clean air will not only protect public health but also make people more productive, because pollution-induced illness can increase absenteeism and harm productivity in the workplace. Id.


standards apply to levels of pollution in the air surrounding us. To reduce levels of ambient pollution, many polluters must reduce their emissions. Accordingly, the CAA requires states to develop state implementation plans (SIPs), containing enforceable emissions limits for stationary sources (e.g., factories and power plants) emitting criteria pollutants and their precursors. These plans must contain standards adequate to secure attainment of the NAAQS, and EPA reviews the plans to make sure that they do. Although the CAA primarily relies upon state regulation to achieve the NAAQS, it carves out a substantial federal role as well. EPA must establish New Source Performance Standards for major new and modified sources under § 111 of the CAA. The CAA also establishes a “technology-forcing” program of federal regulation of “mobile sources” such as cars and trucks, which includes regulation of fuel.

The CAA also operationalizes its health and environmental protection goal by requiring federal regulation of hazardous air pollutants—non-criteria pollutants associated with very serious health effects such as cancer and birth defects—designed to protect public health with an “ample margin of safety.” This program did not work very well under the 1970 and 1977 CAA Amendments, primarily because EPA listed only eight pollutants for regulation. So Congress itself listed 191 hazardous air pollutants for mandatory federal regulation in the 1990 Amendments.

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27. See id. at 65–67, n.2 (characterizing the requirement that the plans secure attainment as “the heart of the 1970 Amendments” and citing the language requiring EPA review).


29. Id.


32. Id.

33. Id.
1990 Amendments require a round of technology-based regulation of major sources of hazardous air pollution based on maximizing feasible emission reductions. Congress did not, however, abandon the goal of fully protecting public health, requiring a second round of regulation designed to protect public health with an ample margin of safety from any residual risk, thereby largely mirroring the standard setting approach of the 1970 Amendments in a second phase of contemplated regulation.

The CAA introduced an enforcement innovation consistent with its effort to vigorously pursue the goal of fully protecting public health and the environment in spite of likely resistance by regulated industries and government officials influenced by them—the citizen suit. It empowered “any person,” including individual citizens, to sue violators of the CAA and to seek judicial review of EPA’s implementing decisions.

The CAA became increasingly lengthy and complex over time. The 1970 Amendments established the statute as perhaps the most complex and lengthy statute other than the Internal Revenue Code. In 1977, Congress added complex provisions requiring a program for Prevention of Significant Deterioration (PSD) of air quality in areas that had attained the NAAQS, in order to prevent them from becoming nonattainment areas and to preserve visibility in the national parks. The PSD program requires new and modified “major sources” to use Best Available Control Technology (BACT) to limit their emissions. The Congress

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34. See id. (explaining that these standards are to be based on the “maximum achievable control technology”).

35. See id. at 1080 (noting that the second stage of regulation is “health-based” as it was prior to the 1990 Amendments).

36. 42 U.S.C. §§ 7604(a), 7607(b).

37. See, e.g., Errol Meidinger, On Explaining the Development of ‘Emissions Trading’ in U.S. Air Pollution Regulation, 7 L. & Pol’Y 447, 451 (1985) (characterizing the CAA as “one of the more complicated statutes yet produced by a modern industrial state”).


enacting the 1990 Amendments sought to correct EPA’s and the states’ failure to achieve the CAA’s health protection goals through extremely detailed instructions with respect to both hazardous and criteria air pollutants. It also added new titles addressing acid rain and stratospheric ozone depletion. Furthermore, it adapted the statute to reflect elite opinion favoring emissions trading, by creating a trading program regulating sulfur dioxide in the acid rain title and by authorizing market-based mechanisms in SIPs. Finally, it required that owners and operators of major sources obtain an operating permit detailing how they would comply with all of the CAA requirements applicable to each source in order to improve compliance and enforcement. All of these amendments created a broad federal role in securing clean air and passed with overwhelming bipartisan support.

B. The Evolution of Philosophy Toward Clean Air

The modern CAA reflects a particular environmental and health protection philosophy. Senator Edmund Muskie, a major architect of the CAA, believed that the government should make sure that the public has clean and safe air to breathe. Although the CAA contains numerous provisions that require consideration of cost (for example, in the technology-based standard setting provisions that one finds throughout much of the CAA), ultimately the CAA reflects a philosophy of giving primacy to protection of the


41. Id. §§ 7651–7651o, 7671–7671q.
42. Id. §§ 7410(a)(2)(A), 7651–7651e.
43. Util. Air Regulatory Grp., 573 U.S. at 309 (noting that Title V requires a “comprehensive operating permit”).
public health and the environment. 46 Indeed, the Senate Report accompanying the 1970 Amendments make it clear that owners of polluting facilities should figure out how to operate without harming public health and the environment or shut down. 47 Thus the CAA reflects a technology-forcing philosophy—a view that given sufficiently strict standards, polluters would figure out how to operate without damaging public health and accomplish feats that appeared infeasible. 48 The primacy afforded public health protection is congruent with a rights-based view of environmental protection that one often finds reflected in the common law, especially in earlier cases. 49

This rights-based view, however, attracted criticism, which gained strength during the 1980s. During the 1970s, Richard Posner helped establish law and economics as an overarching framework to guide legal decision-making. 50 He claimed that law often aims to achieve economic efficiency and argued for the

47. See Union Elec. Co., 427 U.S. at 259 (noting that the Senate committee determined that air pollution sources must either meet the health-based standards or “be closed down” (quoting S. REP. NO. 91-1196, at 2–3 (1970))).
48. See id. at 258–59 (concluding that the entire Congress demanded attainment of the NAAQS within three years “even if attainment does not appear feasible”).
normative desirability of economic efficiency.\textsuperscript{51} Cost-benefit analysis (CBA) of regulation can, in principle, weed out economically inefficient rules.\textsuperscript{52} The law-and-economics movement strongly influenced lawyers and other policy-making elites and came to exercise a great deal of influence over law, including environmental law.\textsuperscript{53} Regulated corporations championed CBA from early on, recognizing its potential to delay and weaken regulation.\textsuperscript{54} In 1982, Ronald Reagan promulgated an executive order demanding CBA of major regulations.\textsuperscript{55} This order also ended the independence of EPA, which Richard Nixon had helped establish in order to implement the rights-based view of environmental law reflected in the CAA and other major environmental statutes of the 1970s.\textsuperscript{56} The executive order did this by authorizing the Office of Information and Regulatory Affairs (OIRA) in the Office of Management Budget to oversee EPA implementation of the CAA and other environmental statutes.\textsuperscript{57}


\textsuperscript{53} Id. at 1–3.


\textsuperscript{57} See Exec. Order No. 12,291, 3 C.F.R. 127, § 3 (1981) (detailing the steps needed to obtain OMB approval of agency action).
Over the years, elite policy experts came to embrace CBA and many of the attitudes that often came with it. Legal scholars at elite law schools, for example, associated CBA not only with economic efficiency, but also with enhanced rationality, better priority setting, and improvement of “overall well-being.”58 These views enjoy little support from environmental law professors, who have grave concerns about the application of CBA to difficult-to-quantify environmental effects and who tend to support the values embedded in the original statutes.59

Law and economics usually treats law as being about balancing costs and benefits. Its proponents see rational environmental regulation as a product of some sort of balancing and identify CBA with balancing. They often treat a law aimed at a very specific goal as likely to trigger unintended consequences and as creating unhealthy “tunnel vision.” Justice Stephen Breyer’s academic work fits within this elite tradition and offers perhaps the best articulation of concerns about tunnel vision and priority setting derived from a view of environmental law as just another form of economic resource allocation.60 Thus, elite opinion, defined as the opinion of policy experts and business leaders, shifted toward a balancing approach during the 1980s.

Political opinion, defined as the opinion of elected politicians, shifted more slowly. Although Congress appeared initially hostile to CBA, by the mid-1990s it enacted a law basically ratifying the

58. See Driesen, Distributing Costs, supra note 52, at 60–66 (reviewing these arguments).


reform contained in the executive orders.61 Furthermore, while initially a Republican reform, Democratic presidents promulgated executive orders retaining OIRA review and CBA as part of the regulatory structure.62 Thus, by the mid-1990s both elite and political opinion had shifted away from supporting rights-based environmental protection toward support of a “balanced” approach of some kind.63

Although politicians and other elites have moved toward cost-benefit balancing and skepticism toward regulation, public opinion has remained much more stable in support of the CAA’s original philosophy. From 1994 to 2016, between 71% and 80% of the public indicated that we should do whatever it takes to protect the environment.64


62. See, e.g., Exec. Order No. 12,866 § 1(b)(6), 58 Fed. Reg. 51,735 (Oct. 4, 1993) (stating that a regulation’s benefits should “justify” the costs); see also Lisa Heinzerling, Quality Control: A Reply to Professor Sunstein, 102 CALIF. L. REV. 1457, 1462 (2014) (critiquing the views of President Obama’s first head of OIRA, Cass Sunstein).

63. See Andrew McFee Thompson, Comment, Free Market Environmentalism and the Common Law: Confusion, Nostalgia, and Inconsistency, 45 EMORY L.J. 1329, 1329–30 (1996) (noting that by the time of the Clinton Administration, a majority in Congress no longer had a positive view of environmental statutes).

64. On eleven occasions from 1994–2016, the Pew Research Center asked respondents whether “[t]he country should do whatever it takes to protect the environment” or “[t]he country has gone too far in its efforts to protect the environment.” PEW RESEARCH CENTER, MARCH 2016 POLITICAL SURVEY (2016), http://www.people-press.org/files/2016/03/03-31-2016-Political-topline-for-release.pdf. Support for the former option ranged from 71–80%, support for the latter from 15–25%. Id. When asked to weigh a tradeoff between environmental protection and economic growth, popular majorities usually still favor environmental protection, though by a narrower margin. Environment, GALLUP, http://www.gallup.com/poll/1615/environment.aspx (last visited Dec. 4, 2018) (on file with the Washington and Lee Law Review). In twenty-nine polls conducted from 1984–2016, a majority of respondents supported environmental protection over economic growth in eighteen and a plurality did so in another six. Id. Only five times, all from 2009–2013, did a plurality favor economic growth. Id.
C. Global Climate Disruption

By the 1990s, a new environmental problem had become prominent—global climate disruption. Greenhouse gas emissions, mostly from burning fossil fuels, have warmed the earth’s average mean surface temperature and will increase that temperature further unless emissions are eliminated. Moreover, this warming triggers very serious consequences: increasingly severe extreme weather events, rising seas, inundation of coastal areas, killer heat waves, drought, the spread of infectious diseases, destruction of ecosystems, and the elimination of many species figure among its myriad effects. Because this problem stems from greenhouse gas emissions around the world, avoiding dangerous climate disruption requires global effort.

In 1990, Congress required study of global climate disruption but did not include specific provisions explicitly establishing standards for greenhouse gas emissions. The 1990 Amendments do contain specific provisions to tackle a related global problem, stratospheric ozone depletion, requiring a phase-out of the major ozone depleting chemicals to implement, and in some ways go beyond, the Montreal Protocol on Ozone Depleting Substances, which the United States ratified in 1988. But no international

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65. See Massachusetts v. EPA, 549 U.S. 497, 509 (2007) (noting that in 1990 the Intergovernmental Panel on Climate Change (IPCC) concluded that human activities are increasing the temperature).

66. See id. at 521–23 (referencing the scientific reports documenting these consequences).

67. See id. at 545 (Roberts, C.J., dissenting) (noting that 80% of greenhouse gas emissions “originate outside the United States”).

68. See Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096 (establishing a program “aimed at understanding and responding to global change, including the cumulative effects of human activities and natural processes on the environment, to promote discussions toward international protocols in global change research”); see also Global Climate Protection Act, Pub. L. 100-204, 101 Stat. 1331, Title XI (codified in note following 15 U.S.C. § 2901) (directing EPA to propose a “coordinated national policy on climate change” and to make diplomatic efforts to address it).


treaty addressing global climate disruption existed in 1990, and the science was just becoming established.

During the 1990s, however, the global community established a treaty regime to address global climate disruption. At the United Nations Conference on Environment and Development in 1992, many countries signed on to the United Nation’s Framework Convention on Climate Change (Framework Convention), which the United States subsequently ratified. This agreement provides a set of principles and goals for addressing climate disruption, but does not contain binding obligations to reduce greenhouse gas emissions. In 1997, the Conference of the Parties to the Framework Convention adopted the Kyoto Protocol to the Framework Convention, which requires developed countries to reduce greenhouse gas emissions. The United States, however, never ratified the Kyoto Protocol, and President George W. Bush expressly repudiated it in 2001. This failure to ratify the Kyoto Protocol suggests a significant change in political climate, as the United States throughout the 1970s and 1980s regularly led international efforts to combat serious international environmental problems.

In 2008, however, it appeared that the United States would at least follow other nations’ lead and address global climate disruption. In that year’s presidential election, both Republican candidate John McCain and his rival Barack Obama favored action.

71. See Massachusetts, 549 U.S. at 508–09 (noting that the IPCC “published its first comprehensive report” in 1990 and that President Bush signed the United Nations Framework Convention on Climate Change in 1992).


73. See Massachusetts, 549 U.S. at 455 (mentioning the Framework Convention’s goal and principles, while recognizing its lack of binding emission reduction commitments).


75. Letter to Members of the Senate on the Kyoto Protocol on Climate Change, 37 WEEKLY COMP. PRES. DOC. 444 (Mar. 13, 2001).

on global climate disruption.\textsuperscript{77} And, consistent with this bipartisan consensus, the House passed comprehensive legislation mandating reductions in greenhouse gas emissions primarily through an emissions trading program shortly after President Obama’s inauguration.\textsuperscript{78} This legislation, however, failed to pass the Senate.\textsuperscript{79}

Since then, the political landscape has shifted in ways that make the political climate today radically different from the political climate that existed when Congress created and amended the CAA and even from the climate prevailing in 2008. Opposition to action on global climate disruption has become an article of faith among Republican politicians and presidential candidates.\textsuperscript{80} Thus, political opinion has recently departed markedly from educated elite opinion, which tends to favor some action on global climate disruption in light of the strong evidence of significant harm, even though it favors basing that action on CBA.

This shift in political opinion made it impossible to pass new legislation to address climate disruption even after 2008. Accordingly, President Obama addressed it primarily under the CAA.\textsuperscript{81} President Trump, however, declared climate disruption a


\textsuperscript{79} See Kassie Siegel et al., \textit{Strong Law, Timid Implementation: How the EPA Can Apply the Full Force of the Clean Air Act to Address the Climate Crisis}, 30 UCLA J. ENVTL. L. & POL’Y 185, 186 (2012) (mentioning the “defeat of economy-wide climate legislation in the 111th Congress”).

\textsuperscript{80} See id. at 186 (describing the Congress elected in 2010 as “openly hostile to any form of greenhouse regulation”); see also Art Swift, \textit{Americans Again Pick Environment Over Economic Growth}, GALLUP (Mar. 20, 2014), http://www.gallup.com/poll/168017/americans-again-pick-environment-economic-growth.aspx (last visited Dec. 4, 2018) (indicating that about two-thirds of Democrats but only one-third of Republicans would give environmental protection priority over economic growth in 2014 and noting that this is the largest partisan gulf since 1997) (on file with the Washington and Lee Law Review).

\textsuperscript{81} See Uma Outka, \textit{The Obama Administration’s Clean Air Act Legacy and
hoax and seeks to unwind Obama Administration initiatives to address the issue.82

D. Summary of Background

In sum, the CAA reflects a rights-based view of environmental law that enjoyed broad bipartisan and public support for at least twenty years. Since its enactment, however, this view has become less popular among both elites and politicians.83 In addition, EPA and thus the courts have recently applied the CAA to a new problem not fully anticipated in 1970 or even 1990—the problem of global climate disruption.84 These background realities invite consideration of whether the Court has dynamically interpreted the statute either to adapt to a new problem or to adapt to new attitudes among elites or politicians. That question requires some consideration of broader judicial trends in statutory interpretation, which also may influence cases’ outcomes.

III. Purpose, Text, and Judge-Made Law: The Court’s Interpretation of the Clean Air Act from 1970 to 2004

A. Purpose and Text in Statutory Interpretation

A venerable canon of statutory construction urges courts to construe statutes in a way that effectuates their purposes.85
Allegiance to this canon, however, has waxed and waned over time.86

At the time of the 1970 Amendments, the Court took this canon quite seriously.87 By the mid-1980s, however, the Court began to criticize reliance on purpose.88 The Court expressed doubt about purpose’s utility because it increasingly saw statutes as embodying complex legislative compromises not aimed at a single overarching purpose.89 This view mirrors public choice theory, which understands legislation as embodying a compromise among special interests, rather than as reflecting rational pursuit of some public interest goal.90 Justice Scalia later articulated anxiety that under a purposeful approach judges would construe statutes to reflect their own views of what the statutes’ purposes should be.91

The standard account suggests that the Court embraced textualism as an alternative to purposivism.92 Justice Scalia in particular saw textualism as offering a means of principled interpretation to constrain judges’ tendency to interpret statutes

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86. See David M. Driesen, Purposeless Construction, 48 WAKE FOREST L. REV. 97, 115–17 (2013) (discussing the Court’s decreased emphasis on congressional purpose when interpreting statutory meaning).


88. See Driesen, supra note 86, at 111 (identifying the decline of purpose with the Rehnquist Court).


90. See Driesen, supra note 86, at 119 (noting that the emphasis on legislative compromise found in Dimension Financial Corp. and other cases “echoes public choice theorists’ claims”).

91. See Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ., 550 U.S. 81, 117 (2007) (Scalia, J., dissenting) (expressing concern that purposeful construction encourages judges to assume that Congress “must have meant” what judges think it “should have meant”).

92. Cf. ESKRIDGE, supra note 10, at 218–29 (offering a subtle account of the rise of textualism and the receding of reliance on legislative history to uncover both specific and general intent).
in accordance with their views of sensible law. Judicial proponents of textualism did not wholly reject considering either purpose or statutory context as tools for resolving textual ambiguity, but they tended to give purpose less weight than their colleagues and often did not recognize ambiguity that their colleagues found in statutory text.

Scholars have extensively debated the use of purpose and text in statutory interpretation and those interested in that debate can refer to materials cited in the notes. But two questions merit some emphasis here. First of all, scholars debate the question of whether giving weight to purpose leads to judicial activism. Second, scholars debate whether textualism constrains judicial politics and provides definitive guidance to resolving Supreme Court cases. This case study provides some evidence relevant to these debates.

93. See Zuni, 550 U.S. at 109–10 (Scalia, J., dissenting) (contrasting “policy-driven interpretation” with interpretation based on text); Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 DUKE L.J. 511, 521 (characterizing himself as one who often finds that a statute’s meaning is “apparent from its text and from its relationship with other laws”).

94. See Manning, supra note 20, at 17 (noting that “textualists” use purpose to clarify ambiguities).

95. See infra notes 96–97.


97. See Eskridge, supra note 10, at 230–34 (claiming that textualism does not provide more constraint than competing methodologies); Jane S. Schachter, Text or Consequences?, 76 BROOK. L. REV. 1007, 1011 (2011) (discussing Justice Scalia’s avoidance of interpretations that he thinks have unreasonable normative consequences); William N. Eskridge, The New Textualism and Normative Canons, 113 COLUM. L. REV. 531, 533 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)) (noting that...

Many of the cases decided in the 1970s reflect careful attention to text and consideration of purpose. Moreover, the consideration of purpose was fairly broad, encompassing not just the statute’s overall health protection purpose, but an understanding of the structural elements put in place to achieve that purpose. And the Court carefully considered the underlying philosophy behind the statute in the first cases to reach it. Furthermore, in most of the cases considered during this period, the Court granted certiorari in order to resolve conflicts among the circuits.

In the first modern CAA case to reach the high court, Train v. Natural Resources Defense Council, Inc., the Court recognized the structural shift reflected in the 1970 Amendments. In particular, it recognized that the CAA had sharply increased the federal role and made state achievement of the NAAQS mandatory in response to disappointment with previous state efforts to improve air quality. It colorfully described the 1970 Amendments as “taking a stick to the States” in response to their


98. See infra notes 101–112 and accompanying text.
99. See infra notes 101–112 and accompanying text.
102. See id. at 64 (stating that “the response of the State to these manifestations of increasing congressional concern with air pollution was disappointing”).
failure to make progress when attainment of the NAAQS was optional. The Train Court, after carefully parsing statutory language and examining the legislative history, statutory structure, and the “history of congressional efforts to control pollution,” upheld an EPA variance procedure that only permitted variances when they do not interfere with the CAA’s goal of obtaining compliance with the NAAQS.

The Court linked Train’s understanding of the CAA’s structural reform to the philosophy underlying the CAA in a case decided two years later, Union Electric Co. v. EPA. The Union Electric Court held that concerns about economic or technological infeasibility cannot provide a basis for rejecting a SIP. It squarely relied on the CAA’s history and purpose to justify this conclusion. The Court characterized the 1970 Amendments as “a drastic remedy” to a serious air pollution problem. Thus, it viewed the statute as pursuing a particular public purpose—environmental protection—which had become important, not as a general welter of special interest bargains or an all things considered balancing exercise. It viewed the requirement that states formulate and implement plans to achieve the NAAQS as “of a ‘technology-forcing character’” in that it would require “regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.” The Court, however, derived this reading of the statute in part from careful consideration of the text governing SIPs. That text mentions a host of factors that EPA may

103. Id.
104. Id. at 63; Manning, supra note 20, at 10–11 (noting that “strong purposivists” derive purpose from a statute’s tenor, its historical context, and “statements in legislative history”).
106. See id. at 256 (holding claims of economic and technological feasibility “wholly foreign” to EPA review of a SIP).
107. See id. at 257 (stating that the requirements were “expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.”).
108. Id. at 256.
109. Id. at 257.
110. See id. at 257–58.
consider, but nowhere mentions cost or technological feasibility.\textsuperscript{111} The Court inferred an intent not to authorize consideration of cost from the relevant provision’s failure to mention it.\textsuperscript{112}

The Court buttressed this ruling with careful consideration of the legislative history, which showed a clear philosophical decision to give public health primacy. In particular, it cited a statement by Senator Muskie and a Senate Report asserting that public health was more important than feasibility, and therefore that polluters will be asked to do “what seems to be impossible at the present time,”\textsuperscript{113} and must meet health-based standards or “be closed down.”\textsuperscript{114}

Thus, the Act’s earliest decisions grappled with the CAA’s philosophy, its goal, its structure, and its language. And no Justice wrote a dissent in either case, not even Justice William Rehnquist, the Court’s leading skeptic of federal regulation at the time.\textsuperscript{115}

The evolution of the CAA leading to the 1977 Amendments, however, created a misalignment of purpose and structure with text, which divided the Court in Adamo Wrecking Co. v. United States.\textsuperscript{116} The 1970 Amendments authorize promulgation and enforcement of “emission standards” for hazardous air pollutants, including criminal enforcement for “knowing” violations.\textsuperscript{117} EPA soon discovered that it was not possible to enforce a numerical emission limit when it was not feasible to measure emissions.\textsuperscript{118} In regulating asbestos emissions from building demolition, EPA addressed this problem by crafting a “work practice” standard—a requirement to take a particular action limiting pollution—instead

\begin{itemize}
  \item \textsuperscript{111} See id. at 257.
  \item \textsuperscript{112} See id. (stating that the basis for the Administrator’s considerations “must be among the eight criteria”).
  \item \textsuperscript{113} Id. at 258–59 (citing 116 Cong. Rec. 32901–32902 (1970) (statement of Senator Muskie)).
  \item \textsuperscript{114} Id. at 259 (citing S. Rep. No. 91-1196, at 2–3 (1970)).
  \item \textsuperscript{116} 434 U.S. 275 (1978).
  \item \textsuperscript{117} Id. at 276–77 (citing 42 U.S.C. § 7413).
  \item \textsuperscript{118} See id. at 286–87 (discussing EPA’s conclusion that it “could not regulate emissions” from demolition of buildings that released asbestos).
\end{itemize}
of a performance standard requiring a specific level of emissions.\textsuperscript{119} Congress accepted this innovation in the 1977 Amendments, explicitly authorizing promulgation of work practice standards, but failed to update the criminal enforcement provision to explicitly reflect the change.\textsuperscript{120} The Adamo Court held that EPA could not criminally enforce a work practice standard, quite plausibly (from a textual standpoint) construing the term “emission limit” as only encompassing performance standards.\textsuperscript{121} Four Justices filed dissenting opinions.\textsuperscript{122} Three of them argued that the defendant’s claim amounted to a request for judicial review of rulemaking through an enforcement proceeding, which the CAA’s judicial review provision prohibits.\textsuperscript{123} Justice John Paul Stevens argued that the term “emissions standard” need not be construed to exclude a “work practice standard” and should not be, because such a construction conflicts with the statute’s structure and purpose by making a valid standard unenforceable.\textsuperscript{124} Congress promptly amended the statute to overrule this example of textualism trumping purpose and structure, thereby suggesting that Justice Stevens’ view of Congressional intent was correct.\textsuperscript{125}

\begin{itemize}
\item \textsuperscript{119}. See id. (explaining how EPA chose to regulate certain work practices when it found emission limits impracticable).
\item \textsuperscript{120}. See id. at 306 (Stevens, J., dissenting) (explaining that Congress confirmed EPA’s authority to promulgate work practice standards in the 1977 Amendments but did not amend the enforcement provision); see also 42 U.S.C. § 7413 (2012).
\item \textsuperscript{121}. See Adamo Wrecking Co., 434 U.S. at 276–77, 285–86 (explaining that the CAA made “emission standards” criminally enforceable and distinguishes between quantitative emission standards and orders to employ a particular pollution control technique).
\item \textsuperscript{122}. Id. at 291, 293 (Stevens, J., dissenting).
\item \textsuperscript{123}. See id. at 291 (Stewart, J., dissenting) (stating that the Court’s view subjects the EPA Administrator to judicial review in a criminal proceeding, contrary to a statutory bar on such review).
\item \textsuperscript{124}. See id. at 293–94 (Stevens, J, dissenting) (criticizing the majority for adopting a construction preventing effective enforcement of standards regulating hazardous air pollutants and stating that “nothing in the . . . 1970 statute . . . compels so crippling an interpretation”).
\item \textsuperscript{125}. See United States v. Ethyl Corp., 576 F. Supp. 80, 82 (M.D. La. 1983), rev’d on other grounds, 761 F.2d 1153 (5th Cir. 1985), cert. denied 474 U.S. 1070 (1986) (recognizing that Congress has superseded Adamo). Justice Scalia in a different context rejected the idea that a congressional override implies that the Court erred, by suggesting that the “will of the Congress” overriding the
In a case not implicating the CAA’s fundamental purposes, text controlled the outcome on its own. In *Harrison v. PPG Industries, Inc.* the Court held that a provision authorizing direct review of “any other final” agency action in the court of appeals granted the Court of Appeals for the Fifth Circuit jurisdiction to review an agency letter interpreting a rule. Justices Rehnquist and Stevens dissented primarily based on concern about expansion of direct court of appeals review of informal agency action. But during this period, the CAA’s text usually trumped judicial policy preferences, even the preference about the organization of judicial review that Justices Rehnquist and Stevens articulated.

The Court, however, sometimes failed to follow statutory purpose because doing so would conflict with clear statement rules reflecting constitutional values. The *Adamo* Court relied to a small degree on the rule of lenity, which serves constitutional due process values by requiring clear statements about what triggers criminal liability. In *Hancock v. Train*, the Court relied much more heavily on a rule requiring clear statement of an intent to require state regulation of a federal instrumentality in holding that the CAA did not require federal facilities to obtain an

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126. See 446 U.S. 578 (1980).

127. See *id.* at 586–88 (holding that the word “any” precluded acceptance of a reading confining direct review in the court of appeals to cases involving a contemporaneous administrative record compiled after notice and an opportunity for a hearing).

128. See *id.* at 600 (discussing this expansion of jurisdiction and the difficulties it will create).

129. See Eskridge, *The New Textualism and Normative Canons*, supra note 97, at 575 (noting the rule of lenity’s links to Due Process).

operating permit from the State.\textsuperscript{131} Congress promptly superseded this holding with a statutory amendment (just as it did after Adamo).\textsuperscript{132}

Thus, the Court in the 1970s tended to follow statutory purpose and text and usually issued unanimous or nearly unanimous opinions, as indicated in Table 1. The Court also freely relied upon structure and legislative history.\textsuperscript{133} When the Court made rulings that undermined statutory purpose, Congress superseded its decisions, thereby suggesting that the Court got it wrong.\textsuperscript{134} And the Court only acted contrary to statutory purpose where specific text or a constitutional value pushed in that direction.\textsuperscript{135} The only case to produce a 5–4 decision, Adamo, generated a split because the most natural reading of the relevant statutory text conflicted with statutory purpose and any sensible policy.\textsuperscript{136} In sum, this decade featured one unanimous holding;\textsuperscript{137} two with a single dissent, one of which was overridden by Congress;\textsuperscript{138} one with two dissents;\textsuperscript{139} and one divided 5–4, which was subsequently overridden by Congress.\textsuperscript{140}

\begin{itemize}
\item \textsuperscript{131} See id. at 178–79 (explaining the basis for this clear statement rule).
\item \textsuperscript{132} See United States v. Pa. Envtl. Hearing Bd., 584 F.2d 1273, 1280 n.22 (3d Cir. 1978) (recognizing that the 1977 Amendments superseded Hancock).
\item \textsuperscript{133} See Vermeule, supra note 87, at 183 (2001) (noting that the Warren Court frequently “tailored general commands to their background purposes”).
\item \textsuperscript{134} See generally Eskridge, supra note 8; William N. Eskridge, Jr., Reneging on History? Playing the Court/Congress/President Civil-Rights Game, 79 CALIF. L. REV. 613, 683 (1991); Deborah A. Widiss, Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation, 90 TEX. L. REV. 859, 942 (2012); Kathryn A. Eidmann, Comment, Ledbetter in Congress: The Limits of Narrow Legislative Override, 117 YALE L.J. 971, 979 (2008).
\item \textsuperscript{135} See supra sources cited note 134.
\item \textsuperscript{136} Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978).
\item \textsuperscript{137} Union Elec. Co. v. EPA, 427 U.S. 246 (1976).
\item \textsuperscript{139} Harrison v. PPG Indus., Inc., 446 U.S. 578 (1980).
\item \textsuperscript{140} See Adamo, 434 U.S. at 276 (providing the vote count); supra note 125 and accompanying text (discussing the Congressional override).
\end{itemize}
Table 1: Size of Dissenting Bloc

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<td>UNION ELEC. CO. v. EPA (1976)&lt;sup&gt;141&lt;/sup&gt;</td>
<td>TRAIN, EPA v. NRDC (1975)&lt;sup&gt;142&lt;/sup&gt;</td>
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<td>HANCOCK, AG OF KY. v. TRAIN, EPA (1976)&lt;sup&gt;143&lt;/sup&gt;</td>
<td>HARRISON, EPA v. PPG INDUS., INC. (1980)&lt;sup&gt;144&lt;/sup&gt;</td>
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<td>ADAMO WRECKING CO. v. U.S. (1978)&lt;sup&gt;145&lt;/sup&gt;</td>
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<td><strong>1981–1989</strong></td>
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<td>CHEVRON U.S.A., INC. v. NRDC (1984)&lt;sup&gt;146&lt;/sup&gt;</td>
<td>PENN. v. DEL. VALLEY CITIZENS’ COUNCIL FOR CLEAN AIR (1986)&lt;sup&gt;147&lt;/sup&gt;</td>
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<td>DOW CHEMICAL CO. v. US, EPA (1986)&lt;sup&gt;148&lt;/sup&gt;</td>
<td>RUCKELSHAUS, EPA v. SIERRA CLUB (1983)&lt;sup&gt;149&lt;/sup&gt;</td>
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<td>PENN. v. DEL. VALLEY CITIZENS’ COUNCIL FOR CLEAN AIR (1987)&lt;sup&gt;150&lt;/sup&gt;</td>
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142. 421 U.S. 60 (1975).
143. 426 U.S. 167 (1976).
144. 446 U.S. 578 (1980).
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<th>Year</th>
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<td>WHITMAN, EPA v. AM. TRUCKING ASSNS., INC. (2001)152</td>
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<td>UTIL. AIR REGULATORY GRP. v. EPA (2014)158</td>
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<td>MICHIGAN v. EPA (2015)159</td>
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156. 572 U.S. 489 (2014).
158. 573 U.S. 302 (2014). The characterization of Utility Air Regulatory Group v. EPA as divided 5-4 is based on its resolution of the question of whether the CAA’s PSD and Title V permit programs apply to greenhouse gas emissions from sources already regulated under the BACT program. See id. At 331-33, 343-44 (majority and dissenting opinions).
These cases generally suggest a Court genuinely engaged in trying to faithfully implement congressional decisions. Purposivism seems to have led the Court to decisions that often followed the CAA’s philosophy. Our reading of these decisions’ style as blending text and purpose comports with William Eskridge’s account of the Burger Court’s tendencies across a broader range of cases.\textsuperscript{160}

C. The Decline of Purposivism and the Rise of Judicial Policymaking in the 1980s

The 1980s saw the decline of explicit purposivism, but contrary to standard accounts, textualism did not immediately take its place. Instead, many of the Court’s CAA decisions during this decade evince a judicial pursuit of policy goals that are unmoored from statutory text and purpose.\textsuperscript{161} Indeed, almost all of them form part of a body of transstatutory case law that creates a judicially crafted common law on attorneys’ fees.\textsuperscript{162} This change produced rulings that often followed the conservative leanings of the Rehnquist Court, but stood in some tension with the CAA’s philosophy.\textsuperscript{163} Also, unlike the Hancock case (and to some extent, Adamo), the common law principles guiding the 1980s decisions lack a constitutional foundation.\textsuperscript{164}

In order to make citizen suits and judicial review financially viable, the CAA authorizes a court to award attorneys’ fees “whenever it determines that such award is appropriate.”\textsuperscript{165} An attorney fee case reached the Supreme Court after the Court of Appeals for the D.C. Circuit determined that an award was

\begin{footnotesize}
\begin{itemize}
\item[160.] See Eskridge, supra note 10, at 219–20 (noting that the Burger Court revived plain meaning but checked legislative history to confirm it and to understand statutory purpose).
\item[162.] See id.
\item[163.] See id.
\item[164.] See id. at 595–97.
\item[165.] 42 U.S.C. § 7607(f) (2012).
\end{itemize}
\end{footnotesize}
appropriate, even though the environmental petitioners seeking the award did not prevail on the merits. The Supreme Court
reversed, in a 5–4 decision, holding that an award of attorney fees is not appropriate absent some success on the merits. Neither
the majority nor the dissent discussed the relationship between attorney fees and the protection of public health, although the
dissent did mention congressional intent to encourage public interest litigation.

In order to reach its conclusion, the majority wrenched a single word, “appropriate,” out of its statutory context to create room for
Supreme Court common law policymaking. The entire sentence in which the word “appropriate” appears does not literally permit
the result the majority reached. For that sentence does not require that the award be appropriate; it only requires that a court
determine that the award is appropriate, and a court—the D.C.
Circuit—had done so. The Supreme Court, however, treated the
word “appropriate” as authorizing the Supreme Court to fashion a
general rule about when fees are appropriate and based its
decision on a background legal principle disfavoring fee-shifting,
which it had previously identified with a longstanding tradition in
a case arising under the Mineral Leasing Act and the National
Environmental Policy Act. The dissent, however, advocated a

166. See Ruckelshaus v. EPA, 463 U.S. 680, 681–82 (1983) (noting that the
court of appeals awarded $45,000 to the Sierra Club and $46,000 to the
Environmental Defense Fund even though they did not prevail on the merits).
167. See id. at 682 (requiring “some success on the merits” in order to win a
fee award).
168. See id. at 704 (Stevens, J., dissenting) (noting that the fee award’s
purpose was to “encourage litigation which [sic] will assure proper
implementation . . . of the act or otherwise serve the public interest”) (quoting
H.R. REP. NO. 95-294, at 337 (1977)).
169. See id. at 703.
170. See id. at 710.
171. Cf. id. at 701 (Stevens, J., dissenting) (concluding that the court of
appeals “complied with the plain language of the statute” because it
“explained . . . why it believed an award . . . appropriate”).
172. See id. at 683–85 (discussing relevant background principles); Aleyeska
the origins of the “American Rule” that prevailing parties cannot collect attorney
fees from the losing party). The Aleyeska Court identified this rule with the old
common law of England and the early practice of U.S. federal courts. See id. at
different conclusion based on the CAA’s text, read in the context of other statutes authorizing attorney fees.\textsuperscript{173} It noted that many statutes expressly authorize attorney fees only to “prevailing parties,”\textsuperscript{174} but that the CAA does not contain this limitation, suggesting that Congress intended no such restriction.\textsuperscript{175} The legislative history likewise supports the dissent’s position. That history, as the dissent points out, shows that the Senate Committee had considered limiting attorney fees to prevailing parties, but did not adopt a provision containing that limitation.\textsuperscript{176} The House Report also expressly indicates that the language of the statute ultimately adopted was not intended to limit the court to awarding fees to prevailing parties.\textsuperscript{177} Thus, the Court’s decision depended heavily on wrenching the word “appropriate” from its context in the statute and putting it into the context of a common law rule created by the Court as a background presumption.\textsuperscript{178} Unlike the one previous 5–4 decision, \textit{Adamo}, this case did not come from a conflict between purpose and text, but rather from a conflict between common law judging and faithful contextual reading of the CAA.

The Court followed up with a pair of decisions restricting the use of multipliers to reward public interest attorneys for superior representation or substantial litigation risks.\textsuperscript{179} Both of these

\begin{itemize}
\item \textsuperscript{173} See \textit{Ruckelshaus}, 463 U.S. at 702 (Stevens, J., dissenting) (arguing that “Congress did not intend the outcome of the case to be conclusive in the decision whether to award fees under § 307(f)”).
\item \textsuperscript{174} See \textit{id.} at 701–02.
\item \textsuperscript{175} See \textit{id.} (stating that “the language of § 307(f) [of the Clean Air Act, 42 U.S.C. § 7607(f) (2012)] differs crucially from the wording of many other federal statutes authorizing the court to award attorney’s fees and costs”).
\item \textsuperscript{176} See \textit{id.} at 703–04 (describing the Senate’s consideration of a provision that failed to make it into the final draft of § 307(f) of the Clean Air Act).
\item \textsuperscript{177} See \textit{id.} at 704 (“The committee did not intend that the court’s discretion to award fees . . . should be restricted to cases in which the party seeking fees was the ‘prevailing party.’”) (quoting H.R. REP. No. 95-294, at 337 (1977))).
\item \textsuperscript{178} See \textit{id.} at 710.
\end{itemize}
rulings develop a judicial common law on the subject of fee awards, and neither feature consideration of the CAA's fundamental purpose. Nor did the language authorizing fee awards provide meaningful guidance to the issues before the Court, as it simply authorized courts to “award costs of litigation (including reasonable attorney fees . . . ).” The ruling restricting fee awards to compensate for the risks of losing litigation did not produce a majority for any rationale, as the Justices’ beliefs about proper attorney fee policy diverged.

A unanimous Court gave short shrift to statutory language in upholding EPA’s right to use aerial surveillance to enforce the CAA in *Dow Chemical Company v. United States.* In that case, EPA relied on a statutory provision authorizing “entry to, upon, or through any premises” upon “presentation of credentials.” In response to Dow Chemical’s argument that this provision does not mention aerial surveillance and that unannounced surveillance conflicts with the presentation-of-credentials requirement, the Court made no textual argument about whether aerial surveillance might be an “entry to, upon, or through” the premises nor did it engage in any discussion of the presentation-of-credentials requirement. Instead, the *Dow Chemical* Court treated the statutory enforcement remedies as non-exclusive. In spite of rather specific statutory language, the

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180. Cf. *Delaware Valley II*, 483 U.S. at 725, 735 (plurality and dissenting opinions) (citing CAA legislative history to support their positions).

181. See *City of Burlington v. Dague*, 505 U.S. 557, 561–67 (1992) (Scalia, J.) (creating a rule against enhancement of attorney fees to reflect the risk of losing under the Clean Water Act and the Solid Waste Disposal Act based on various policy rationales and the *Delaware Valley II* plurality opinion); *Delaware Valley I*, 478 U.S. at 557 (quoting 42 U.S.C. § 7604(d) (2012)).

182. Compare *Delaware Valley II*, 483 U.S. at 724–31 (plurality opinion), with *id.* at 731–34 (O’Connor, J., concurring).


184. *Id.* at 233–34.

185. *Id.*

186. See *id.* at 234 (finding “no suggestion . . . that the powers conferred by §114(a) [of 42 U.S.C. § 7414] are intended to be exclusive”).
Dow Chemical Court followed the attorney fee cases in relying on a general background principle of law—in the Dow Chemical case, the principle that enforcement authority “carries with it all modes of . . . investigation . . . useful” to its execution.\textsuperscript{187}

The Court unanimously adopted a reading of the CAA that furthered statutory purposes without mentioning the CAA’s overall purpose. The conservative justices appear to have done so because the case also raised a constitutional issue that they viewed as more significant.\textsuperscript{188} Given the opportunity to trim the Fourth Amendment protection against unreasonable search and seizures, they held that the CAA authorized the search at issue and that the Fourth Amendment did not prohibit it.\textsuperscript{189} The statutory holding was unanimous, but the constitutional holding was 5–4, with most of the Justices’ votes falling along conventional ideological lines.\textsuperscript{190}

The most famous CAA case of this period, Chevron v. Natural Resources Defense Council,\textsuperscript{191} provides further evidence of the decline of purpose and structure as guides to the Court’s decisions. Most students and scholars know Chevron as a leading administrative law case establishing the rule that courts must defer to reasonable agency interpretations of ambiguous statutes.\textsuperscript{192} But a careful reading of Chevron as a CAA case shows that Chevron also provides an example of the decline of purpose as a guide to statutory interpretation.

The Chevron Court upheld an EPA decision to use a plant-wide definition of the term “stationary source” for purposes of administering a permit program for new sources.\textsuperscript{193} Under the plant-wide definition, a modification or installation increasing

\textsuperscript{187} Id. at 233.
\textsuperscript{188} Cf. Trevor Morrison, Constitutional Avoidance in the Executive Branch, 106 Colum. L. Rev. 1189, 1192 (2006) (noting that the canon counseling courts to avoid constitutional issues if fairly possible is a “prominent” rule of statutory construction).
\textsuperscript{189} See Dow Chemical, 476 U.S. at 234–52 (describing, in the majority and dissenting opinions, the investigatory authority Congress vested in EPA).
\textsuperscript{190} See id.
\textsuperscript{191} 467 U.S. 837 (1984).
\textsuperscript{193} See Chevron, 467 U.S. at 840–42 (discussing the drafter’s failure to define “stationary source”).
emissions of one piece of equipment would not trigger strict new source regulatory requirements, if reductions elsewhere in the plant offset the increase.\footnote{See id. at 840 (explaining that a plant owner “may install or modify one piece of equipment without meeting permit conditions if the alternation will not increase total emissions from the plant”).} This source definition facilitated a move toward emissions trading, a reform commended by economists but not in use at the time.\footnote{See id. at 863 n.37 (recognizing that bubbles and offsets are a “first step” toward reliance on “economic incentives” proposed by economists).}

The Court correctly recognized that the CAA’s stationary source definition read in isolation does not answer the question of whether a plant-wide definition is permissible.\footnote{See id. at 861–62 (finding the relevant language “not dispositive” because the relevant provision uses “overlapping language” not precisely directed to the question before the Court).} It therefore treated the statute as ambiguous and deferred to EPA’s reasonable construction.\footnote{See id. at 865–66 (finding that Congress did not resolve the meaning of the statute “on the level of specificity required by these cases” and therefore deferring to EPA).}

In \textit{Chevron}, the CAA’s purpose and structure serve the role of the dog that did not bark.\footnote{See \textit{Eskridge}, supra note 10, at 220 (discussing Sherlock Holmes’s use of inferences from a dog not barking in the “Silver Blaze” story).} The Court of Appeals had construed the CAA as providing for a dual source definition, based not on the language of the stationary source definition (which it likewise found ambiguous), but on the statute’s goals and structure.\footnote{See \textit{Chevron}, 467 U.S. at 841, 842 n.7 (recognizing that the Court of Appeals ruling relied on the “purposes of the nonattainment program”) (quoting Nat. Res. Def. Council v. Gorsuch, 685 F.2d 718, 726 n.39 (1982))).} Under this dual definition, EPA should use a plant-wide source definition for pollution in areas that had attained the NAAQS (attainment areas), but not in areas that had not attained the NAAQS (nonattainment areas).\footnote{See id. at 840–41.} It based this ruling on the correct idea that the CAA aimed to improve air quality in nonattainment areas, whilst it only sought to maintain existing air quality in attainment areas.\footnote{See id. at 841–42 (characterizing the court of appeals opinion as treating air quality improvement as the nonattainment program’s “raison d’être”).} For technical reasons described in
the margin, the plant-wide definition should in principle suffice to maintain air quality but not to improve it.\textsuperscript{202} The failure of the Supreme Court to even discuss this point suggests a decline in the role of statutory purpose and structure in its jurisprudence.\textsuperscript{203}

The standard accounts suggest that as purpose receded in importance, textualism took its place. The CAA cases of the 1980s tell a different story. For the most part, at least in the CAA context, judge-made common law filled the gap created by purpose's decline, not any devotion to textualism.\textsuperscript{204} But in one case on a very technical issue—\textit{Chevron}—the Court substituted agency deference for a common law rule of its own devising.\textsuperscript{205}

This move toward common law decision-making led to (or perhaps reflects) ideological division on the Court. As Table 1 (above) indicates, the Court’s CAA decisions were more closely divided during this period than they had been in the 1970s, and as Table 2 indicates (below), these divides usually tracked ideological lines.

\begin{itemize}
  \item \textsuperscript{202} Under the 1977 Amendments, the construction or modification of a piece of equipment under a plantwide definition would lead to maintenance but not improvement of air quality, because the plantwide definition would allow pollution increasing changes to occur if the plant owner offset those increases with other changes in the plant. \textit{See id.} at 841. Under a narrow source definition treating each piece of equipment as a stationary source, emission increasing modifications or installations would lead to declining net emissions, because they would trigger requirements to control the new emissions and offset the remaining emissions at a greater than 1:1 ratio. \textit{See Nat. Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 721 n.13 (D.C. Cir. 1982), rev’d sub nom. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984) (noting that under EPA’s offset ruling “emissions from existing sources in the [nonattainment] region must be reduced by an amount greater than the contemplated emissions from the proposed new or modified source”) (emphasis added).}
  \item \textsuperscript{203} The principle of deference to agencies announced in \textit{Chevron} did not by itself preclude consideration of whether statutory purpose resolved textual ambiguity. \textit{See id.} at 843 n.9 (noting that the Court must give effect to specific congressional intent found through “traditional tools of statutory construction”). The \textit{Chevron} Court relied on a policy goal of allowing “reasonable economic growth” based on legislative history, but not on the CAA’s stated overall goal. \textit{See id.} at 851–52, 863 (describing allowance of economic growth as one of the policies behind the new source review program).
  \item \textsuperscript{204} \textit{See Driesen, supra} note 86, at 111.
  \item \textsuperscript{205} \textit{See, e.g., The Two Faces of Chevron, supra} note 192.
\end{itemize}
### Table 2: Ideologically Ordered/Disordered Voting

<table>
<thead>
<tr>
<th>Time Period</th>
<th>UNANIMOUS</th>
<th>DISORDERED</th>
<th>DIVIDED BUT IDIOLOGICALLY ORDERED</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ADAMO WRECKING CO. v. UNITED STATES (1978)(^\text{208})</td>
<td>HARRISON, EPA v. PPG INDUS., INC. (1980)(^\text{209})</td>
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<td>PENNSYLVANIA v. DEL. VALLEY CITIZENS’ COUNCIL FOR CLEAN AIR (1986)(^\text{214})</td>
<td>PENNSYLVANIA v. DEL. VALLEY CITIZENS’ COUNCIL FOR CLEAN AIR (1987)(^\text{215})</td>
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207. 426 U.S. 167 (1976).
<table>
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<tr>
<th>Year</th>
<th>Case</th>
<th>Case</th>
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<tbody>
<tr>
<td></td>
<td>WHITMAN, EPA v. AM. TRUCKING ASS’NS, INC. (2001)</td>
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<td>EPA v. EME HOMER CITY GENERATION (2014)</td>
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<td>UTIL. AIR REGULATORY GROUP v. EPA (2014)</td>
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<td>MICHIGAN v. EPA (2015)</td>
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</table>

We rely here on the Justices’ annual Martin-Quinn scores, a measure of judicial ideology widely used by political scientists.225 “Ordered” indicates that the Justices’ votes fall as would be predicted by the ordering of these scores.226 “Disordered” indicates that at least one Justice voted in a way not predicted by the alignment of these scores; in other words, with the Justices placed in a straight line from left to right, at least one Justice jumped over one or more neighboring colleagues to join with colleagues located further away in ideological space.227


A few years after Justice Scalia joined the Court in 1986, the Court, in keeping with his judicial philosophy, started to fill the void left by declining support for purposivism with textualism, rather than common law decision-making or deference to EPA.228 Most of these cases seem congruent with statutory purpose, but the Court followed the text even when it served to undermine the CAA’s structure and purpose (as it had in Adamo).229

General Motors Corp. v. United States,230 decided four years after Justice Scalia joined the Court, featured careful textual work

225. On the calculation of Martin-Quinn scores as ideal points for judicial ideologies, see Andrew D. Martin & Kevin M. Quinn, Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999, 10 POL. ANALYSIS 134 (2002) (data through the 2015 term available for download at http://mqscores.berkeley.edu/measures.php). As Martin-Quinn scores are calculated in part by including previous voting patterns of the justices, these endogenous measures err on the side of ideological attribution. For an exogenous measure commonly used in judicial decision-making studies, see Jeffrey A. Segal & Albert D. Cover, Ideological Values and the Votes of U.S. Supreme Court Justices, 83 AM. POL. SCI. REV. 557 (1989). On the use of “voting disorder” as an indicator of influences beyond the single ideological dimension commonly employed in studies of judicial decision-making, see Paul H. Edelman, David E. Klein, & Stefanie A. Lindquist, Measuring Deviations from Expected Voting Patterns on Collegial Courts, 5 J. EMPIRICAL LEGAL STUD. 819 (2008).

226. Id.

227. Id.

228. Cf. ESKRIDGE, supra note 10, at 228 (noting that Justice Scalia’s new textualism advocated consideration of statutory structure).

229. Id.

integrating a number of statutory subsections. The case resolved a circuit split on the question of whether an EPA failure to timely act on a SIP revision bars EPA enforcement of the existing SIP requirements. The Court recognized that the CAA expressly authorizes enforcement of an “applicable implementation plan” and defines an applicable implementation plan as the most recent approved version. The Court also noted that the statute provides remedies for delays in approving a SIP revision, but that the remedies provided do not explicitly include an enforcement bar. The Court therefore held that EPA may enforce a SIP after a state has submitted a revision that EPA has not completed reviewing.

This case’s treatment of listed remedies as exclusive contrasts with Dow Chemical’s treatment of remedies as non-exclusive. Both cases serve the Act’s purposes, but neither mentions purpose. They simply take opposite approaches to interpreting texts governing remedies.

In Whitman v. American Trucking Ass’ns, Justice Scalia followed the text to reach a result similar to that which the Court had reached in Union Electric more than two decades before. Just as the Union Electric Court had held that EPA may not consider cost in deciding whether to approve a SIP because the SIP approval provision does not mention cost, the American Trucking Court held that EPA may not consider cost in promulgating the NAAQS because the provisions governing the NAAQS do not mention it, instead requiring a standard to protect public health with an

231. Cf. Eskridge, supra note 10, at 228 (noting that Justice Scalia’s new textualism advocated consideration of statutory structure).
232. See Gen. Motors Corp. v. United States, 496 U.S. 530, 536 (1990) (explaining that the Court “granted certiorari because of a disagreement among the Circuits as to whether EPA is barred from enforcing an existing SIP if the agency fails to take action on a proposed SIP revision within four months”).
233. Id. at 540.
234. See id. at 540–41 n.4 (mentioning actions to compel agency action and a request for penalty reduction in the event of prejudice from the delay).
235. See id. at 539–42.
“adequate margin of safety.” The Court relied squarely on both Union Electric and General Motors in declining to import a new element into a statutory provision that does not mention the sought after element.

This case featured a prodigious effort to bring the changes in elite opinion to bear in litigation under the CAA. The numerous briefs filed by industry and its allies argue that rational policy requires CBA, or at least consideration of cost, in keeping with the teachings of law and economics. The Court’s rejection of this argument under the leadership of a Justice not suspected of any personal sympathy for the CAA’s philosophy arguably provides evidence that text can sometimes restrain judicial activism.

Yet, Justice Breyer’s concurrence signals his philosophical support for the elite views that emerged in the late 1970s and 1980s, stating that to better “achieve regulatory goals—for example, to allocate resources so that they save more lives or produce a cleaner environment—regulators must often take into account all of a proposed regulation’s adverse effects.” This treatment of regulation as a form of resource allocation echoes a fundamental tenet of the law and economics movement. And the reference to considering all of regulation’s “adverse effects” strongly suggests support for CBA. Yet, he concludes that the

239. See id. at 465 (finding it fairly clear that the instruction to set NAAQS “to protect public health” with an “adequate margin of safety” does not permit consideration of cost).

240. See id. at 467–68 (“We have therefore refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted.”).


242. See Amicus Brief Supporting General Electric, supra note 241, at *1 (arguing that judicial scrutiny of administrative statutes must include cost analysis).

Congress adopting the 1970 Amendments had a philosophy and approach that postpones cost considerations until later in the process of implementing the CAA.244 And he defends the congressional decision to exclude cost from consideration at the time of NAAQS promulgation, because he recognizes that technology-forcing makes cost unpredictable.245

While both General Motors and American Trucking feature an alignment between statutory text and purpose, the two diverged in Engine Manufacturers Ass'ns v. South Coast Air Quality Management District,246 and the Court chose text over purpose by an 8–1 margin.247 The Court held that the CAA preempted California requirements that fleet owners purchase clean vehicles (vehicles with very low emissions).248 This case interpreted a statutory subsection preemption “standard[s] relating to the control of emissions from new motor vehicles.”249 The Court found, understandably, that requirements to purchase clean vehicles generally constituted standards relating to the control of emissions.250

Justice Souter’s dissent shows that statutory structure and legislative history support a narrower reading of the relevant subsection.251 For example, Congress mandated state clean fuel fleet rules, which makes the conclusion that it also preempted such requirements odd.252 The dissent also applies a presumption
against preemption that the Court has repeatedly stated applies to interpretation of preemption provisions, but rarely gives force to. The case, as a whole, clearly reinforces the primacy of text over purpose and structure.

When text could not resolve a case during this period, the Court split largely on ideological grounds. In *Alaska Department of Environmental Conservation v. EPA (ADEC)*, the Court held, in a 5–4 decision, that EPA can use its authority to stop construction of a new facility to countermand an unreasonable state determination that the facility’s pollution control plan conforms to the CAA. The statutory language germane to this question contains enough vagaries to justify a 5–4 split on textual grounds alone. Yet, the division on the Court tracks general ideological divisions on constitutional federalism questions well enough to make it hard to believe that value-free textual readings determined the outcome. Justice Ginsburg wrote the majority opinion, which Justices Stevens, O’Connor, Souter, and Breyer joined. Justice Kennedy filed a dissenting opinion, joined by Chief Justice Rehnquist and by Justices Scalia and Thomas. The majority deferred to some extent to EPA and also mentioned structural justifications rooted in preventing a race-to-the-bottom in state air pollution regulation and protecting interstate air.
quality interests. The dissent relies in part on another structural argument in the CAA, a principle of giving states the “primary role” in choosing the mix of controls needed to meet federal goals. To buttress this argument, the dissent also cites a constitutional principle presuming that states act in good faith. The opinions and voting alignments here suggest that text sometimes creates ambiguities that get resolved on the basis of federalism philosophy.

On the whole, textualism played a large role in the Court’s CAA cases during this period. From 1990–2004, the Court’s CAA cases...
decisions include two where text and purpose were aligned and the Court was unanimous, emphasizing the statutory text;\textsuperscript{264} one where they diverged, with eight Justices following text but Justice Souter following purpose;\textsuperscript{265} and one where the text was ambiguous and the Court split 5–4 on ideological grounds.\textsuperscript{266} This last case, \textit{Alaska Department of Environmental Conservation v. EPA},\textsuperscript{267} shows that texts sometimes contain ambiguities and that ideology can influence how judges interpret ambiguous texts.

\textbf{E. Summary of 1970–2004}

From 1970 to 2004, the Court often coalesced around textually grounded interpretations, even though the ideological makeup of the Court shifted. In the 1970s, the Court also took statutory purpose quite seriously.\textsuperscript{268} When the Court’s ideological makeup shifted in the 1980s, however, the new conservative majority started to undermine the statutory purpose by creating a judicial common law on attorney fees, which divided the Court.\textsuperscript{269} When the Court turned to reviewing regulatory policy as opposed to enforcement cases in the 1990s and early 2000s, it turned to textualism and often found common ground.\textsuperscript{270} The one case that divided the Court in that last period, \textit{ADEC}, was a genuinely difficult case. Hence, even though the Court divided along Court decided the question of whether the court of appeals ruling in effect invalidated an EPA regulation governing the definition of modification. \textit{See id.} at 581 (finding the court of appeal’s interpretation of EPA’s rules so far-fetched that it amounted to an “implicit invalidation of those regulations”). Once it concluded that it had, the Court remanded the case with instructions to the lower court to consider the question of whether a statutory bar on litigating a rule’s validity more than 60 days after EPA’s rulemaking applied. \textit{Id.} at 581.


\textsuperscript{267} 540 U.S. 461 (2004).

\textsuperscript{268} \textit{See supra} Parts II.A, II.B.

\textsuperscript{269} \textit{See supra} notes 165–181 and accompanying text.

\textsuperscript{270} \textit{See supra} note 263 and accompanying text.
ideological lines from time to time, either in hard cases or in attorney fees cases, it often managed unanimous or nearly unanimous decisions.271

IV. Climate Disruption, Elite Thinking, and the Court: Dynamic Statutory Interpretation

The theory of dynamic statutory interpretation suggests that statutory interpreters do not so much excavate the meaning of statutes as adapt them to new circumstances. Advocates of the theory may have in mind societal problems largely unanticipated by the drafters, such as global climate disruption.272 But the theory also recognizes that judges adapt statutes to new political attitudes and views, such as the growing support for law and economics among intellectual elites and politicians.273 Our analysis of cases from 2005 through 2016 analyzes the type of dynamic statutory interpretation that has occurred during a period when EPA and the Supreme Court grappled with the climate disruption issue.

In addition to the question of what sort of dynamic statutory interpretation the Supreme Court engages in when adjudicating CAA cases, this Part addresses the question of what sort of dynamic statutory interpretation EPA uses in the CAA context.274 This question matters because even if one accepts the idea that dynamic statutory interpretation is either inevitable or desirable (or both), a question arises as to who should adapt the statute to new circumstances.275 Chevron, of course, suggests that where the


272. See supra Part II.C.

273. See ESKRIDGE, supra note 10, at 81 (noting that “ideologies” and “political environments” shape statutory interpretation).


275. See id. at 2712–14 (Thomas, J., concurring) (questioning the
statute is ambiguous the answer should be from the administrative agency implementing the statute—EPA in the CAA context. In any case, the question of who gets to adapt the statute figures in many of these cases, so explaining EPA’s interpretations in dynamic terms will enrich the discussion and pave the way for the normative analysis in Part IV.

A. The Supreme Court and Climate Disruption

During the George W. Bush Administration, petitions requesting EPA to list greenhouse gases as pollutants forced the Agency to consider whether to regulate greenhouse gases and how to adapt the CAA to the new problem of climate disruption. Such a listing would trigger an obligation to regulate greenhouse gas emissions. Although climate disruption had not emerged as a major issue when Congress enacted the CAA, the language governing the listing of air pollutants is so broad that it reaches all substances emitted into the ambient air. Of course, the Executive Branch’s views not only about what the CAA says, but also about what sound policy requires may influence its decisions about how to adapt the statute to address the climate disruption problem.

EPA denied the petitions on the grounds that granting them would create a piecemeal approach to greenhouse gas abatement. The denial facilitated the Bush Administration’s effort to address the problem by supporting technological innovation, encouragement of voluntary reductions, and further research. Furthermore, granting the petitions would, according

276. See Chevron, 467 U.S. at 843.
278. Id.
280. See Massachusetts, 549 U.S. at 513 (citing Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,931 (Sept. 8, 2003)).
281. See id. (citing Control of Emissions from New Highway Vehicles and
to EPA at the time, weaken diplomatic efforts to persuade developing countries to reduce greenhouse gas emissions.282 Thus, by denying the petitions, the Bush EPA, in its view, properly adapted the statute to facilitate the wisest approach to the issue.283 Thus, a political view about how to address global climate disruption influenced the initial decision-maker’s view about how to adapt the CAA to a new problem.

Accordingly, EPA interpreted the key term governing the listing decision—air pollutant—as not including greenhouse gases.284 It construed the statute as focusing on local, not global, air pollution problems.285 It bolstered this conclusion by noting that Congress had considered the problem of global climate disruption but did not specifically mandate regulations to address it.286

The Supreme Court in Massachusetts v. EPA reversed EPA's decision in a 5–4 ruling holding that greenhouse gases constituted air pollutants under the CAA.287 The majority had “little trouble” in reaching this conclusion because the CAA sweepingly defines an air pollutant as “any air pollution agent or combination of agents, including any . . . substance or matter which . . . enters the ambient air.”288 The Court found that the statute unambiguously regulates “all airborne compounds of whatever stripe.”289 From the standpoint of textualism, this was an easy case. From the standpoint of adaptive statutory construction, it might instead depend on judicial views about what statutory approach best adapts the statute to efforts to address global climate disruption.290

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283. See id. at 533.
284. See id. at 513.
285. See id. at 512–13.
286. See id. at 511–12 (discussing EPA’s view of the issue’s “political history”).
287. See id. at 528 (holding that the CAA authorizes regulation of greenhouse gases if they contribute to climate change).
288. See id. at 528–29 (citing 42 U.S.C. § 7602(g)).
289. Id. at 529.
290. See infra notes 310–311 and accompanying text.
A dissent by the Court’s leading textualist, Justice Scalia, offered an extraordinarily contrived reading of CAA § 209 in an effort to escape the majority’s conclusion. The Scalia dissent then accuses the majority of substituting “its own desired outcome” for EPA’s “reasoned judgment.” Thus, the dissenting Justices viewed themselves as deferring to an agency judgment under an ambiguous statute per *Chevron*, while viewing the majority as engaging in inappropriate dynamic statutory interpretation.

The dissent’s reading certainly suggests that text does not always constrain even seemingly devout textualist judges, at least in a highly charged case. *Massachusetts v. EPA* resolved an immensely important and controversial environmental and political issue—whether the CAA authorizes the Executive Branch to address global climate disruption without fresh legislation from Congress. By contrast, we saw in *American Trucking* that text did control when the Court faced a less controversial and older case.

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291. See *Massachusetts v. EPA*, 549 U.S. 497, 556–58 (2007) (Scalia, J., dissenting). The statutory language defines an air pollutant as “any air pollution agent . . . including any . . . substance . . . which is emitted into . . . the ambient air.” 42 U.S.C. § 7602(g) (2012). Although Scalia concedes that this can be read as indicating that the category of air pollution agents includes all substances emitted into the air, he resists this conclusion. *Id.* at 556–57. Scalia argues that the term “any air pollutant agent” may qualify the meaning of substances emitted into the air. *Id.* at 557–58. Since the statute does not define the term “air pollution agent,” Scalia would hold that EPA’s interpretation of that term as only embracing pollutants that occur primarily near the surface of the earth is reasonable, thereby reading it as not embracing greenhouse gases, which primarily occupy the upper atmosphere. *Id.* at 558–59. This conclusion is unconvincing, since the CAA states that the term “air pollution agent” includes “any . . . substance which is emitted into . . . the ambient air,” 42 U.S.C. § 7602(g) (emphasis added), suggesting no limits based on where the pollutant goes after being released into the air around us. Scalia resists this conclusion by arguing that sometimes illustrative terms included within a “general term” (“pollution agent” in this case) are limited by the scope of the general term. See *id.* at 556–58 (relying on the government’s argument that the phrase “any American automobile, including any truck or minivan” would not include foreign trucks or minivans). While this is true, it seems extraordinarily contrived as applied to the term “pollution agent,” which lacks any adjective indicating limits to the term. See *id.* at 529 n.26 (majority opinion) (pointing out that the statute seems consciously crafted to embody a “broad” definition of pollution not limited by atmospheric layers).

292. *Id.* at 560 (Scalia, J., dissenting).

293. See *id.* at 552–53.

294. See *id.* at 528.
Moreover, the lineup of the Justices on the climate disruption issue suggests that when forced to decide what a statute says about a controversial new problem, judges may divide along ideological lines regardless of a statute’s text. The Court’s liberal Justices—Stevens, Souter, Ginsburg, and Breyer (along with Kennedy)—in effect voted to adapt the CAA to the climate disruption problem by triggering EPA regulation. The Court’s conservative Justices—Roberts, Thomas, Alito, and Scalia—in effect voted to adapt the CAA to climate disruption by leaving it to Executive Branch diplomacy and voluntary initiatives. The dissent, although cast in terms of deference to EPA in the face of ambiguity, does not so much excavate past congressional intent as give the statute the meaning that the Bush EPA thinks it should have with respect to the new problem of global emissions causing worldwide environmental disruption.

This lineup suggests something quite troubling about dynamic statutory interpretation. At least for a controversial new problem, it may lead to judges choosing the appropriate form of adaptation in accordance with their own political views. While this is perhaps inevitable when the statute is ambiguous with respect to a new issue, one would like to think that this can be avoided when the text is as clear as that involved in Massachusetts v. EPA.

In the wake of Massachusetts v. EPA, EPA found that greenhouse gases endangered public health and the environment and listed the principal greenhouse gases as regulated pollutants under the CAA. The CAA contains a host of provisions requiring regulation of “any air pollutant;” accordingly, this “endangerment

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296. See Keck, infra note 300.
297. See Massachusetts, 549 U.S. at 531.
298. See id. at 552.
299. See id. at 560.
300. Cf. Thomas M. Keck, Judicial Politics in Polarized Times 140 (2014) (suggesting that judges’ votes diverge more sharply along partisan lines when a hot button issue comes before them).
finding” apparently triggered a host of regulatory obligations. Shortly after President Obama came into office, EPA promulgated, jointly with other agencies, a regulation drastically reducing tailpipe emissions of greenhouse gases from automobiles and other regulatory actions soon followed.

One of EPA’s subsequent regulatory actions provides a clearer example of a new problem requiring a dynamic interpretation updating a statute—the question of how broadly EPA should regulate greenhouse gases. The literal language of the CAA requires applying the CAA’s Prevention of Significant Deterioration (PSD) and operating permit programs to all major sources of air pollution—defined as sources emitting 100 or 250 tons per year. Because pollution sources typically emit greenhouse gases in volumes far exceeding the volumes of emissions of previously regulated air pollutants, these numerical thresholds, if applied literally to greenhouse gas emitters, would sweep in so many smaller sources—such as large office and apartment buildings, hotels, and retail establishments—that it would make it impossible to administer the program. EPA accordingly adapted the statute to this new problem of regulating high volume greenhouse gases in a “Tailoring Rule” by promising to focus initially on large sources while postponing action on

302. See id. at 311–12 (discussing some of EPA’s views of what stationary source requirements the finding would trigger (citing Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts. 50, 51, 70, and 71))).

303. See id. (discussing EPA’s automobile regulations and other regulatory actions).

304. See id. at 310 (discussing these thresholds (citing Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,420, 44,498, 44,511 (July 30, 2008) (to be codified at 40 C.F.R. ch. I))).

305. See id. at 334–35 (Breyer, J., concurring in part and dissenting in part) (explaining the significance of these thresholds as applied to greenhouse gas emissions); see also Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, 144 (D.C. Cir. 2012), aff’d in part, rev’d in part sub nom. Util. Air Regulatory Grp. v. EPA., 573 U.S. 302 (2014), and amended sub nom. Coal. for Responsible Regulation, Inc. v. EPA, 606 F. App’x 6 (D.C. Cir. 2015) (noting that applying the thresholds literally to greenhouse gas-emitting sources would raise permit applications “to jump from 280 per year to over 81,000 per year”).
smaller ones. This problem seems to demand dynamic statutory interpretation, because nobody believes that Congress sought the results that a literal application of the statute would produce.\textsuperscript{307} Thus, the situation seemed to require a decision about how to sensibly adapt the statute to the problem of regulating greenhouse gases in the absence of reliable guidance about what Congress intended.

The D.C. Circuit managed to avoid resolving the tension between sensible statutory adaptation and the CAA’s literal language. Regulated industries and some states, which usually like exemptions from statutes, challenged the rule, whilst environmental groups which usually prefer broad coverage, did not challenge the Tailoring Rule.\textsuperscript{308} Since the Tailoring Rule offers regulatory relief to the petitioning states and industries, the D.C. Circuit held that those parties lacked standing to challenge the Tailoring Rule for want of injury-in-fact.\textsuperscript{309} Thus, the D.C. Circuit left the task of dynamic interpretation to EPA.

For better or worse, however, the Supreme Court grasped the nettle in \textit{Utility Air Regulatory Group v. EPA (UARG)}.\textsuperscript{310} Justice Scalia, writing for the \textit{UARG} majority, engineered an escape from the statute’s literal language with respect to coverage of pollutants in order to adapt the statute to this new problem in a manner the Supreme Court found more sensible than EPA’s approach.\textsuperscript{311}

\begin{itemize}
\item \textsuperscript{306} See Util. Air Regulatory Grp., 573 U.S. at 312–13 (explaining that EPA proposed to apply the program to large sources first and held out the possibility of later exempting smaller ones).
\item \textsuperscript{307} See id. at 319–20 (explaining that Congress’s “profligate use” of the term “air pollutant” was meant to be narrower than the Act-wide definition).
\item \textsuperscript{308} See Coal. for Responsible Regulation, 684 F.3d at 113 (noting that industry and state petitioners did not challenge the Tailoring Rule).
\item \textsuperscript{309} Id. at 146. The Court also held that providing the relief sought, vacating the Tailoring Rule, would exacerbate, rather than redress, the petitioners’ injuries. Id.
\item \textsuperscript{310} 573 U.S. 302 (2014).
\item \textsuperscript{311} See William W. Buzbee, \textit{Anti-Regulatory Skewing and Political Choice in UARG}, 39 Harv. Envtl. L. Rev. 63, 73 (2015) (characterizing the Court’s rewriting of the CAA as the “antithesis” of objective textualism); see also Richard J. Lazarus, \textit{The Opinion Assignment Power, Justice Scalia’s Un-Becoming, and UARG’s Unanticipated Cloud over the Clean Air Act}, 39 Harv. Envtl. L. Rev. 37, 44–45 (2015) (characterizing the opinion as “un-Scalia-like” as it offered a compromise in lieu of adherence to text).
\end{itemize}
Although the CAA applied PSD and Title V to emitters of “any air pollutant” and the Court had held in Massachusetts v. EPA that greenhouse gases are air pollutants, the Court held that the statute should be interpreted to prohibit the application of PSD or Title V to greenhouse gases except in one instance.\textsuperscript{312} The statute, in the majority’s view, applied to the PSD program only insofar as it requires Best Available Control Technology (BACT) of sources already regulated because of exceeding the thresholds for other pollutants.\textsuperscript{313} The majority reasoned that the phrase “any air pollutant” (the trigger for PSD and Title V) must be construed more narrowly than the phrase “each pollutant regulated under this chapter” (which governs BACT), even though the phrase “any air pollutant” seems broader than the phrase “each pollutant subject to regulation \textit{under this chapter}.”\textsuperscript{314}

Dissenting from the holding that EPA may not regulate greenhouse gas emissions under Title V or the general PSD provision, Justice Breyer employed a different dynamic interpretation to save the statute from obsolescence.\textsuperscript{315} Instead of interpreting the phrase “any air pollutant” narrowly, Breyer suggested interpreting the phrase “any stationary source” narrowly to avoid regulating sources that cannot practically be regulated.\textsuperscript{316} Justice Breyer therefore would defer to EPA’s apparent judgment that the CAA should apply to fewer sources than it literally says, not to fewer pollutants than it literally says.\textsuperscript{317}

Justice Breyer defended this result as serving the CAA’s purpose of enhancing and protecting air quality.\textsuperscript{318} He noted that legislative history supported the notion that Congress did not intend such expansive coverage of stationary sources,

\textsuperscript{312} See Util. Air Regulatory Grp., 573 U.S. at 315–28 (seeking to justify this extraordinary interpretation).
\textsuperscript{313} See id. at 331.
\textsuperscript{314} Id. (emphasis added).
\textsuperscript{315} See id. at 341 (Breyer, J., concurring in part and dissenting in part) (recognizing that the statute should be construed to avoid obsolescence).
\textsuperscript{316} See id. at 334–40 (explaining this interpretation).
\textsuperscript{317} See id. at 340 (invoking \textit{Chevron} deference).
\textsuperscript{318} See id. at 341 (arguing that “an implicit source-related exception” serves the CAA’s statutory purpose while going no further).
notwithstanding the numbers in the statute. On the other hand, he suggested that the CAA's broad definition of air pollution was intended to allow expansion to effectively address new problems. Thus, he argued for using statutory purpose as a major guide to figuring out how to adapt a statute to new problems.

While Justice Breyer would have resolved the UARG majority's “selective” literalism with respect to pollution triggers by reading the pollution triggers literally and allowing exemption of some sources, Justices Alito and Thomas would ignore the literal language of the pollution triggers altogether and prohibit any regulation of greenhouse gases under the PSD or Title V programs. Justices Alito and Thomas bolster their views with a dynamic statutory argument of their own—since various aspects of the BACT program fit greenhouse gases poorly, it should not apply to greenhouse gases. Thus, they neither followed the literal language nor provided any other reason to think that their solution comes from a congressional policy decision embodied in the CAA. Instead, they explain why they think that their solution to the new problem makes sense.

A third case, American Electric Power, Co. v. Connecticut (AEP), did not so much adapt the statute to the climate disruption problem as apply prior precedent. In AEP, the Court unanimously held that the CAA displaced federal common law claims against power plants seeking abatement of carbon dioxide emissions. In reaching this conclusion, which creates

319. See id. at 340 (citing legislative history indicating an intent not to regulate the types of sources EPA sought to exclude through the Tailoring Rule).
320. See id. at 341 (finding the majority’s holding inconsistent with Congressional intent to adapt the statute to new air pollution problems uncovered by science).
321. See id. at 343–45 (Alito, J., concurring in part and dissenting in part) (agreeing with the Court’s holding that PSD and Title V do not apply to greenhouse gases, but disagreeing that BACT requirements do and characterizing the majority’s literalism as “selective”).
322. See id. at 345–49 (finding BACT analysis “fundamentally incompatible” with the regulation of greenhouse-gas emissions).
323. See id. at 349.
325. See infra notes 327–328 and accompanying text.
considerable tension with the CAA’s text and purpose, the Court followed a 5–4 decision from the 1980s—Milwaukee v. Illinois (Milwaukee II)\(^{327}\)—which narrowly interpreted identical text in the Clean Water Act to advance a judicial policy disfavoring federal common law.\(^{328}\) In this way, AEP constitutes an extension of the 1980s common law judicial decision-making, albeit based on quasi-constitutional grounds.

Thus, in adapting the CAA to the new problem of climate disruption, the conservative textualist Justices and sometimes the whole Court abandoned text. Their rulings divided mostly along ideological lines, except where a clear (albeit countertextual) precedent based on previous quasi-constitutional judicial policymaking brought them together.\(^{329}\)

**B. Adaptation to Elite Views**

During the same years that EPA began grappling with climate disruption, it dynamically interpreted the CAA’s “Good Neighbor Provision”\(^{330}\) to adapt it to elite views, even though EPA confronted no new pollution problem in applying this provision. The Good Neighbor Provision deals with a longstanding problem of pollution emanating from one state interfering with neighboring states’ efforts to provide clean air.\(^{331}\) It requires state SIPs to prohibit pollution sources from emitting air pollution “in amounts which


\(^{329}\) In UARG, Justices Scalia, Roberts, Kennedy, Alito, and Thomas constituted a conservative majority holding that the PSD and Title V programs generally do not apply to greenhouse gas emissions. Util. Air Regulatory Grp., 573 U.S. 302, 303 (2014). The Court, however, was much less sharply divided on the question of whether EPA could regulate “anyway sources” under BACT. See id. at 330–33, 338 (majority and dissenting opinions) (showing that the Justices supported this holding 7–2, with only Alito and Thomas in dissent).


\(^{331}\) See North Carolina v. EPA, 531 F.3d 896, 908 (D.C. Cir. 2008) (stating the provision’s goal of prohibiting sources “within the [s]tate” from interfering with “any other [s]tate”).
will . . . contribute significantly” to nonattainment of the NAAQS in neighboring states. This provision strongly suggests that EPA should require abatement from pollution sources sufficient to avoid significantly interfering with NAAQS achievement, a task requiring air quality modeling to make sure that the amount of reductions suffice to attain this goal. This focus on environmental effects might imply no consideration of cost or technology in setting targets, a conclusion in keeping with Union Electric’s understanding that the CAA subordinates cost considerations to the goal of achieving the NAAQS.

Such a view of the statute, while textually supported, does not comport with elite intellectual trends. Accordingly, EPA considered the marginal cost effectiveness of pollution reductions and based its plan for abating these emissions on conclusions about sensible cost per ton of pollution reduction numbers. Furthermore, it used a mechanism favored by law and economics—emissions trading—to realize these reductions. But emissions trading works for pollutants where location does not matter, and location does matter to the question of whether a set of reductions will avoid interfering with neighboring states’ attainment efforts.

When the issue of whether EPA acted properly in considering cost in setting the targets reached the Supreme Court in EPA v. 

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333. See North Carolina, 531 F.3d at 908 (stating that EPA’s program to implement the Good Neighbor Provision must eliminate emissions contributing significantly to nonattainment).
337. See North Carolina v. EPA, 531 F.3d 896, 906–08 (D.C. Cir. 2008) (invalidating EPA’s trading program under the Clean Air Interstate Rule on the ground that it does not ensure that each source avoids interfering with neighboring states’ attainment).
EME Homer City Generation (Homer City)\textsuperscript{338} the Court affirmed EPA’s Clean Air Transport Rule in a 6–2 decision.\textsuperscript{339} The Homer City majority clearly treated EPA’s core methodology of considering costs in establishing state abatement obligations as an appropriate adaptation of the statute to the problems of addressing interstate air pollution.\textsuperscript{340} It also approved of employing cost in part based on contemporary elite thinking, finding its use in allocating emission reduction obligations among the states “efficient.”\textsuperscript{341} The majority also linked this adaptation to technical necessity, as it found the alternative suggested by the D.C. Circuit, reducing emissions in proportion to each source’s contribution to each state’s attainment problem, unworkable.\textsuperscript{342} Justice Scalia’s dissent, however, provides a textually strong argument that the statute requires an allocation based on air quality alone, not cost.\textsuperscript{343} And the dissent did not agree that workability considerations required upholding EPA’s decision about the proper methodology for allocating reduction obligations to states.\textsuperscript{344}

On a second issue—whether EPA could promulgate a federal plan implementing its allocations—the dissent and majority flipped their approaches to statutory interpretation. The majority closely followed text that clearly showed that EPA may promulgate a federal implementation plan after disapproving state plans that fail to satisfy the Good Neighbor obligation.\textsuperscript{345} The dissent, however, adapted the statute creatively to solve a perceived

\textsuperscript{338} 572 U.S. 489 (2014).
\textsuperscript{339} See id. at 524.
\textsuperscript{340} See id. (finding that the D.C. Circuit requirement to allocate emission reductions in proportion to each state’s contribution to neighboring states’ air quality problems unworkable).
\textsuperscript{341} See id. at 519–20.
\textsuperscript{342} See id. at 515–16 (finding that the “proportionality approach could scarcely be satisfied in practice”).
\textsuperscript{343} See id. at 527–29 (Scalia, J., dissenting) (pointing out that the statutory reference to significant contribution to air pollution has no logical relationship to cost).
\textsuperscript{344} See id. at 530–35 (Scalia, J., dissenting) (rejecting the majority arguments that proportional reductions are impossible and result in extensive overcontrol).
\textsuperscript{345} See id. at 507–08 (noting that the statute authorizes a FIP anytime within two years of EPA disapproval of a SIP).
problem. Justice Scalia, the apostle of textualism, abandoned text on the ground that states cannot be expected to comply with the Good Neighbor Provision without effective EPA guidance and therefore needed another opportunity to do so now that EPA had issued guidance. The Scalia dissent buttresses this argument with a claim that the CAA’s cooperative federalism structure requires giving states a second chance now that EPA has provided specific targets.

Thus, the Court ratified EPA’s textually problematic adaptation of goal-setting to elite views, but simply followed text to ratify its implementation procedures. The dissent favored honoring textual constraints on EPA’s goal-setting while creatively adapting the statute to reign in EPA’s textually based approach to cooperative federalism.

346. See id. at 538–39 (Scalia, J., dissenting) (accusing the majority of forcing states to guess at what their responsibilities might be with respect to the Good Neighbor Provision). The relevant text requires SIPs to include “provisions . . . prohibiting . . . any source . . . within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in . . . any other State” within three years of EPA’s promulgation of a NAAQS. 42 U.S.C. § 7410(a)(1) (2012); id. § 7410(2)(D)(i). If a state fails to submit an adequate SIP, the relevant text demands that EPA “promulgate a [f]ederal implementation plan at any time within [two] years after” disapproving a SIP. Id. § 7410(c)(1). Because EPA had disapproved the relevant SIPs for noncompliance with the Good Neighbor Provision, it had clear statutory authority to issue a federal implementation plan (FIP). EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 538–39 (2014) (Scalia, J., dissenting). Justice Scalia argued that the statutory principle that states have “the primary responsibility” for air pollution control requires that EPA issue guidance before disapproving a SIP or promulgating a FIP but admits that the statute does not require any EPA guidance at all. See id. at 537 (Scalia, J., dissenting). Scalia argues that EPA has discretion to postpone the SIP submission deadline until after it issues guidance on how to comply with the Good Neighbor Provision, but points to no statutory language authorizing such a postponement. See id. at 542 (Scalia, J., dissenting). He also argues that EPA need not promulgate a FIP before two years elapse, and that doing so is an abuse of discretion in this case. See id. at 542–43 (Scalia, J., dissenting). In short, Scalia’s argument was based on his policy preference for guidance and runs counter to very clear text respecting SIP content and the deadline for SIP submission.

347. See EPA v. EME Homer City Generation, 572 U.S. 489, 537 (2014) (Scalia, J., dissenting) (finding that the majority’s reading abandons cooperative federalism in favor of “centralized federal control”).
A clearer example of judicial adaptation of a statute to elite views comes from *Michigan v. EPA*, which reverses an EPA decision finding regulation of hazardous air pollutants from power plants “appropriate and necessary.” *EPA* found such regulation appropriate and necessary because of evidence that the emissions remaining after application of the acid rain program pose a significant hazard to public health. In making this determination, EPA did not consider cost, deferring such consideration to the first round of regulation, when it considered cost in promulgating technology-based standards to regulate hazardous air pollutants from power plants.

The statutory phrase “appropriate and necessary” on its face seems extraordinarily open-ended. One might take the view that environmental regulation is appropriate and necessary when a pollution problem seriously impacts public health or the environment. Or one might take the view that one should also consider the costs of regulation in deciding about the appropriateness of regulation, a view more in keeping with elite thinking about the importance of CBA. On its face, this sort of open-ended language offers a compelling context for the application of deference to EPA’s decision, as it seems to require a political decision of the sort not appropriate to the judiciary.

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348. *135 S. Ct. 2699 (2015).*
349. See *id.* at 2711–12 (citing 42 U.S.C. § 7412(n)(1)(1) (2012)).
350. See *id.* at 2705 (explaining that EPA decided to regulate coal and oil-fired power plants because the plants’ emissions “posed risks to human health and the environment” and “controls were available to reduce these emissions”).
351. See *id.* at 2705–06 (explaining that EPA “concluded that ‘costs should not be considered’” when deciding whether to regulate power plants but describing the cost-benefit analysis EPA developed in conjunction with the actual regulation (quoting National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, 77 Fed. Reg. 9326 (Feb. 16, 2012) (codified at 40 C.F.R. pts. 60, 63))).
352. See *id.* at 2707 (characterizing the phrase “appropriate and necessary” as capacious (quoting 42 U.S.C. § 7412(n)(1)(A) (2012))).
353. See *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 615 (1980) (plurality opinion) (interpreting a directive to regulate when “reasonably necessary or appropriate to provide safe or healthful employment and places of employment” to require a finding of significant risk).
354. See *Michigan*, *135 S. Ct. at 2718 (Kagan, J., dissenting)* (arguing that
The Court, however, in a 5–4 opinion split along the Court’s liberal–conservative fault line, based its decision on the majority’s preference for elite views and refused to defer to EPA’s preferred reading of a statutory provision that seems devoid of specific content, finding EPA’s cost-blind interpretation unreasonable under *Chevron*. The Court notes early in its opinion that EPA “refused to consider whether the costs of its decision outweighed the benefits.” In keeping with the “comprehensive rationality” traditionally associated with CBA, the Court read the term “appropriate” as an “all-encompassing term.” The appropriateness inquiry requires consideration of cost, because it would not be appropriate to impose “billions of dollars” of cost “for a few dollars in health or environmental benefits.” Thus, the Court assumes that environmental and health benefits can be reasonably described in dollar terms and adopts the views of Cass Sunstein, who has frequently argued that a major benefit of CBA involves avoidance of costs grossly disproportionate to benefits. Echoing Justice Breyer’s academic contributions to the literature advocating a “cost-benefit state,” the Court notes that spending too much on one problem may leave fewer resources to devote to more serious problems, a frequently asserted (and cogently contested) assumption of those viewing regulation as just another form of resource allocation.

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355. See generally Keck, supra note 3, at 186 (noting that “if judicial restraint means anything . . . it must mean that the unelected judiciary” should play a “smaller role in settling divisive conflicts”).

356. Id. at 2711 (finding it unworkable to read the statute “to mean that cost is irrelevant to the initial decision to regulate power plants”).

357. Id. at 2707; cf. McGarity, supra note 54, at 5, 10–11 (explaining the concept of comprehensive rationality and its relationship to CBA).


360. See Michigan, 135 S. Ct. at 2707–08 (“Consideration of cost . . . reflects the reality that ‘too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.’” (quoting Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 233 (2009) (Breyer, J., concurring in part and dissenting in part))).
mandating consideration of formal CBA, it justified its decision to require consideration of cost in evaluating a statutory trigger with many of the same arguments that lie behind the law and economics movement’s support for CBA, including the views of elite moderates, such as Breyer and Sunstein.\textsuperscript{361}

The dissenting Justices (including Justice Breyer) would defer to EPA’s decision, largely because EPA considered cost and indeed conducted a CBA when it developed the regulation that the appropriate and necessary finding led to.\textsuperscript{362} The dissenters, however, echoed the elite views found in the majority opinion as to general regulatory philosophy and suggested that those views would have proven dispositive if EPA had not conformed its subsequent actions to those views. It opined, contrary to the general philosophy of the CAA, that power plant regulation would be “unreasonable” if EPA did not consider cost at all in regulating power plants.\textsuperscript{363} Echoing the majority’s articulation of elite orthodoxy, the dissent supported a presumption favoring the new elite consensus—requiring EPA to consider costs “[u]nless Congress provides otherwise.”\textsuperscript{364} Thus, the dissent articulates a position strikingly at odds with the Court’s cases following the CAA’s original philosophy, as both Union Electric and American Trucking hold that Congress does not intend to require cost consideration unless it specifically mentions cost.\textsuperscript{365} The dissent also echoes the majority’s articulation of concerns about costs


\textsuperscript{361} See Michigan, 135 S. Ct. at 2711 (declining to mandate formal CBA).

\textsuperscript{362} See id. at 2717 (Kagan, J., dissenting) (finding EPA’s action in not considering cost at the first stage reasonable because it considered cost subsequently, including a CBA).

\textsuperscript{363} See id. at 2717.

\textsuperscript{364} Id.

grossly disproportionate to benefits and mandates to clean up one form of pollution wasting resources that might be better spent on more important problems. 366

The elite view disfavoring the CAA’s philosophy of fully protecting public health regardless of apparent cost or feasibility so thoroughly pervades the thinking of the Supreme Court, and perhaps even EPA in this case, that none of the Justices even considered the incongruity of declining to regulate based on cost when the very program before the Court ultimately aimed to provide a basic level of safety regardless of cost. 367 Although the Court extensively discussed the relationship between the “appropriate and necessary” trigger and the immediately subsequent cost-sensitive, technology-based rulemaking, it did not discuss the CAA’s requirement to eliminate residual risk through a standard protecting public health with an ample margin of safety if the technology-based standard proves insufficiently protective. 368 The Court therefore failed to note that relying on cost considerations in declining to regulate hazardous air pollutants found to harm public health and the environment contradicts the CAA’s overall philosophy, which is plainly reflected in the program before it. 369

Thus, recent CAA cases evince a marked turn away from literal statutory interpretation and toward dynamic adaptation of the CAA, either adapting it to elite views or to the problem of

366. See Michigan, 135 S. Ct. at 2717 (Kagan, J., dissenting) (expressing concern about imposing “massive costs far in excess” of benefits and “wasteful expenditure[s]” meaning “considerably fewer resources available to deal” with more serious problems).

367. See 42 U.S.C. § 7412(n)(1)(A) (2012); Michigan, 135 S. Ct. at 2709 (responding to an EPA argument that it need not consider cost in making an appropriate and necessary finding because it “can consider cost when deciding how much to regulate,” thereby suggesting that EPA did not make an argument based on the incompatibility of cost consideration and Section 112’s health protection goal).

368. See Michigan, 135 S. Ct. at 2705 (discussing EPA’s technology-based rulemaking under 42 U.S.C. § 7412(d)).

369. See 42 U.S.C. § 7412(n)(1)(A) (stating that the purpose of the studies under this section of the statute is to find “hazards to public health reasonably anticipated to occur”); see also 116 Cong. Rec. 19,204 (1970) (discussing and debating the importance of developing strategies and technology to achieve clean air because of pollution’s threat to people’s health and wellbeing).
climate disruption. The Court during this period did not consider statutory purpose, even in cases replete with statutory ambiguity. In its place, we find the Court advancing the regulatory philosophy of the majority of Justices. And as Tables 1 and 2 indicate, in every case except *Homer City* (a 6–2 ruling) and *AEP* (a unanimous decision), the Roberts Court divided 5–4 along ideological lines on the question of whether to uphold EPA’s decisions.

C. Summary Description of the Evolution of the Supreme Court’s Approach to Interpreting the Clean Air Act

Thus, the Court’s approach to interpreting the CAA has evolved over time. The first decade’s jurisprudence usually focused on text and purpose, but the Court misinterpreted the CAA, in the eyes of Congress, when it invoked quasi-constitutional clear statement rules to resolve cases or chose a fairly natural textual reading completely at odds with the statutory purpose. The Rehnquist Court abandoned purpose in the 1980s and began treating statutory interpretation under the CAA as an occasion to elaborate judge-made common law. But this emphasis on judge-made law took place in the context of issues regarding attorney fees, which judges may feel competent to resolve according to their own policy views. When abandoning purpose in the context of a more technical regulatory issue, the Court deferred to EPA in *Chevron*. Beginning in the 1990s, the Court mostly based its decisions on statutory text and turned to purpose.

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371. Supra Tables 1 and 2.
372. See, e.g., *Union Elec. Co.*, 427 U.S. at 258 (using both the “language and the legislative history” in stating that the statute “leaves no room for claims of technological or economic infeasibility”).
374. See, e.g., id. at 548.
only in one especially difficult statutory case (ADEC).376 Throughout this latter period (1990–2004), the Court almost always decided cases unanimously or with a large majority, and the one split decision (again ADEC) involved a genuinely difficult issue.377

The last decade, however, has featured a turn toward dynamic statutory interpretation. Some dynamic statutory interpretation cases adapted the CAA to the climate disruption problem, but others adapted the CAA to trends in elite thinking.378

This turn toward dynamic interpretation coincided with a trend toward ideological decision-making. As Table 2 indicates, four of the five decisions issued in the last decade were divided on ideological lines.379 Moreover, the Justices’ tendency to adapt the statute to their own preferences through split decisions dominates cases where the text is clear (e.g. Massachusetts v. EPA, where the majority followed it, and UARG, where nobody followed it) and where the text says very little (e.g. Michigan v. EPA).380

The recent division and emphasis on judicial policymaking reminds one of the Rehnquist Court’s common law experiment.381 But the modern cases differ from the 1980s common law cases in at least one respect; the Rehnquist Court made policy decisions in an area where one might expect judicial competence, namely the attorney fee policies for federal litigation.382 The more recent cases feature judicial decisions about core regulatory questions, where

376. See Alaska Dep’t of Env’tl. Conservation v. EPA, 540 U.S. 461, 470 (2004) (noting that the purpose of the relevant statutory provisions is to protect public health and welfare).
377. Supra Table 1.
378. See, e.g., Michigan, 135 S. Ct. at 2707 (interpreting “appropriate and necessary” to require some consideration of costs); Massachusetts v. EPA, 549 U.S. 497, 534 (2007) (discussing global warming in relation to the regulation of greenhouse gasses).
379. Supra Table 2.
381. See supra note 373 and accompanying text.
382. See supra note 374 and accompanying text.
one can expect relatively little judicial expertise and substantial congressional and EPA engagement.383

General common law principles do play some role in the recent dynamic cases, but these general principles do not constitute traditional background principles of substantive law, but rather recently minted interpretive canons, as Lisa Heinzerling has shown.384 In UARG, the Court applied a presumption against “unheralded” economically and politically important exertions of regulatory power under “long extant statutes.”385 This constitutes an important canon from the standpoint of dynamic statutory interpretation. It suggests a judicial presumption in favor of adapting a statute to important new problems by not allowing it to reach the problem even if its text seems to apply.386 It comports with the recent anti-regulatory turn in the Republican Party.387 But as Massachusetts v. EPA demonstrates, the Court has not consistently applied this anti-regulation presumption.388 In Michigan v. EPA, the Court created a presumption in favor of considering cost, thus putting itself in the camp of elite opinion at

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386. See Heinzerling, supra note 384, at 1946 (defining the canon as promising skepticism toward agency interpretations of “long extant statutes” as authorizing regulation in an area of “vast economic and political significance”) (internal quotations omitted).

387. See Buzbee, supra note 311, at 75 (characterizing this canon as “anti-regulatory”).

388. See Heinzerling, supra note 384, at 1953–54 (discussing the inconsistency between UARG, 573 U.S. 302 (2014), and Massachusetts v. EPA, 549 U.S. 487 (2007)).
the expense of the philosophy behind the CAA. This canon constitutes a general principle favoring adaptation of the CAA to the elite opinion emanating from the law and economics movement.

In spite of the Court’s unity on the need to conform the statute to the prevailing principles of the law and economics movement, the Court remains divided on how to resolve cases. The only time in the last decade where the Court managed a unanimous CAA ruling—AEP—involves following precedent slighting text in favor of quasi-constitutional judicial lawmaking. Thus, the cases suggest a willingness to adhere to judicial policy, but no consensus on whether to follow the overall policy behind the CAA.

V. Lessons for Dynamic Statutory Interpretation

In this Part, we normatively critique the Court’s dynamic interpretation with a goal of advancing the art of dynamic statutory interpretation. We focus on how and when judges should adapt statutes to new problems with consideration of the propriety of judges updating statutes to reflect changes in elite or political opinion.

A. Purpose as Dynamic Archaeology

William Eskridge, the leading proponent of dynamic statutory interpretation, does not claim to have answered the key normative question that the existence of dynamic statutory interpretation

389. See Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015) (finding that cost should be a factor in deciding whether to regulate power plans and failing to discuss health and safety considerations' role in the regulatory process).

390. See generally Eskridge, supra note 10, at 297, 301 (discussing the idea of statutory canons as an expression of judicial ideology and some canons as responding to the scarcity concerns at the heart of law and economics).

Eskridge presents dynamic interpretation as an alternative to both intentionalism and purposivism, which he characterizes as archaeological approaches. He concludes that purposivism, like intentionalism, “can establish no connection with majority-based preferences in the hard cases.” At the same time, he describes implementing the legislature’s “general intent” about the goals of a statute as a form of dynamic interpretation. And he favors “bending” the statute’s literal terms in order to achieve this general intent in adapting the statute to changing circumstances. Eskridge’s position suggests the possibility that judges can adapt a statute to new circumstances by using the values embedded in the statute’s goals to guide the adaptation and that doing so conforms to both the precepts of a “faithful agent” theory of statutory interpretation and the exigencies of dynamic interpretation. This means that archaeological and dynamic statutory approaches overlap when a court uses a very general congressional intent to decide how to adapt a statute to a new problem. We might call this “dynamic purposivism.”

392. See Eskridge, supra note 10, at 107–08 (identifying the normative issues raised by an understanding of dynamic statutory interpretation as whether it is justifiable and if so when and how it should be used).
393. See id. at 13, 25–34 (characterizing discovery of congressional intent through text and purpose as “archaeological” and explaining why purposivism fails as a “foundational theory of statutory interpretation”).
394. Id. at 26.
395. See id. at 121 (pointing out that serving a statute’s goals requires dynamic interpretation as circumstances change in order to conform to “general intent”); see also Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 COLUM. L. REV. 223, 249–52 (1986) (advocating adherence to statutory purpose as an antidote to rent-seeking).
396. Eskridge, supra note 10, at 121.
397. See supra note 396 and accompanying text; Manning, supra note 20, at 9 (explaining that purposivism allows “federal judges to fulfill their presumed duty as Congress’s faithful agents”).
398. See Eskridge, supra note 10, at 26 (characterizing purposivism as “attractive” because it both “allows a statute to evolve” and ties “interpretation to original legislative expectations”).
One of us has argued previously that courts should construe statutes to effectuate their stated purposes, at least where the statute is ambiguous, primarily on the grounds that stated purposes are likely to reflect goals enjoying broad public support.399 This argument suggests that dynamic statutory interpretation should follow the general intent of the enacting Congress when possible.

Eskridge’s suggestion that judges might appropriately bend text to dynamically interpret statutes in keeping with their purposes would support Justice Stevens’ dissent in Adamo.400 The term “emission standard[]” might most naturally indicate a numerical limit on the amount of air pollution, but perhaps the Court should have creatively read the term to include a work practice requirement that has the effect of limiting air pollution in order to allow the CAA to meet its goals.401 It is linguistically plausible to read the term “emission standard” as including any requirement that has the effect of reducing emissions, and such a reading would avoid the problem of hindering the enforcement of a properly enacted work practice standard.402

Eskridge’s claim that neither purposivism nor intentionalism connects results to majority preferences in hard cases suggests an acknowledgment that they can do so in easy cases.403 From the standpoint of purposivism and intentionalism, Massachusetts v. EPA should have been an easy case.

399. See Driesen, supra note 86, at 98; see also Macey, supra note 395, at 250 (claiming that a statute’s stated purpose will almost always be “public-regarding”).

400. Adamo Wrecking Co. v. United States, 434 U.S. 275, 293–307 (1978) (Stevens, J., dissenting); cf. Eskridge, supra note 10, at 50–55 (discussing dynamic interpretation of a prohibition on immigration of people with a “mental defect” to permit immigration of homosexuals in spite of original expectation that the term would exclude them from the U.S.).

401. See Adamo, 434 U.S. at 294–95 (Stevens, J., dissenting) (arguing that the term “emission standard” should be interpreted to allow the requirement to water down asbestos prior to demolition because this requirement has the “effect” of “curtail[ing] the quantity of asbestos . . . emitted”).

402. See id. at 306 (pointing out that the majority’s reading makes work practice standards unenforceable).

403. See supra note 396 and accompanying text.
This case may have divided the Court not because it is hard to discern what the enacting Congresses intended based on purposivism and intentionalism (as required by the archaeological approach), but because applying the statute faithfully to this particular new problem puts judges in the uncomfortable position of deciding an important question that is politically controversial now. This adaptive aspect of Massachusetts v. EPA, not textual ambiguity or any legitimate doubt about the CAA's purpose, may explain why it generated a 5–4 decision.404 Justice Stevens wrote about the congruity of adaptation to a new problem with following Congressional intent in his opinion for the Court:

While the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.405

Justice Stevens did not explain why failing to apply the CAA to greenhouse gases renders the statute obsolete, but the answer is plain enough. The CAA is intended to protect public health and the environment, and it cannot do so absent coverage of greenhouse gases. Thus, this passage can be read as supporting construing general capacious language naturally to allow adaptations serving the statute’s purposes.

Although the dissent's statutory argument on the merits is cast in terms of deference to EPA, the dissent on standing (for the same four Justices) suggests a desire to follow the policy judgment of current elected officials.406 Justice Scalia has elsewhere expressed concern that adaptive interpretation might prevent statutes from dying a natural death and therefore interfere with the prerogatives of new Congresses.407 This conservative desire to

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405. Id. at 532.
406. See id. at 535 (Roberts, J., dissenting) (noting ongoing consideration of climate disruption in Congress and the Executive Branch and describing the litigation as an expression of dissatisfaction with the elected branches' progress on the issue).
avoid expansive interpretation of regulatory statutes might help explain why textually strained arguments appeared sensible to dissenters who often find much more constraint in more ambiguous texts.408

All of this suggests that dynamic statutory interpretation based on the judges’ views becomes inevitable when the statute and its purpose bear an uncertain relationship to the problem at hand, but that in cases where the text or purpose bear pretty plainly on a new issue before the Court, dynamic purposivism remains an available option. Indeed, the faithful agent theory (that the Courts should be a “faithful agent” of the enacting Congress) would suggest that the dissenters erred because they should have simply applied the text and purpose to the new pollutant.409 In other words, recognizing that dynamic interpretation based on the judges’ views becomes inevitable in hard cases does not rule out the possibility that dynamic purposivism can establish a connection to majority preferences in easy cases.

Legislation usually attempts to govern the future by establishing broad general principles that apply to future circumstances, not through exclusive examples.410 Thus, the CAA is about air pollutants, substances that harm public health and the environment when emitted into the air, not just about the particular pollutants causing the problems that Congress knew about in 1970.411 The rule of law suggests that the Court should


409. See Manning, supra note 20, at 9.


411. See Massachusetts, 549 U.S. at 506 (quoting the relevant statutory
follow the statute’s text and purpose when they provide an answer to the question before them, as it did in *Massachusetts v. EPA*.

**B. How and When to Adapt Statutes to Changes in Elite and Political Opinion**

It may appear troubling to Justices to let legislation apply to new problems within the ambit of applicable statutory language or purpose, when the current legislature would not endorse the result. That problem, we have suggested, caused a 5–4 split in *Massachusetts v. EPA*.

Scalia’s concern about preserving the prerogatives of the current Congress cannot supply an adequate answer to the question of how to address a split between current political opinion and the opinion of the drafters of an old statute. No matter what the Court does, congressional prerogatives remain intact. Congress remained free, after *Massachusetts v. EPA*, to pass legislation forbidding federal regulation of greenhouse gases.\(^{412}\) And had the Court held that the CAA currently does not authorize regulation of greenhouse gases, Congress would remain free to override that decision and authorize standards limiting greenhouse gas emissions. The concept of “congressional prerogative” must refer to the right to pass legislation, which is a right of the institution as a whole, not a right belonging to an individual member or a faction within the Congress.

When the Court issues holdings contrary to statutory purpose and when the enacting coalition remains in power in Congress and the White House, judicial decisions may not matter very much. As *Hancock* and *Adamo* illustrate, the congressional coalitions that enacted the original statute can override judicial decisions contrary to the enacting coalition’s intentions to correct the Court’s misreading.\(^{413}\) Hence, the Court’s deviations from congressional

\(^{412}\) See id. at 533–35.

\(^{413}\) See United States v. Pa. Envtl. Hearing Bd., 584 F.2d 1273, 1287 n.22 (3d Cir. 1978) (recognizing that the 1977 Amendments superseded *Hancock v.*
intent in *Hancock* and *Adamo* had a very limited impact, because Congresses that consistently favored environmental protection promptly superseded these decisions.414

But when the enacting coalition does not remain in power, judicial decisions, even incorrect ones, may matter a lot. The Court’s CAA decisions have become more important lately, precisely because political opinion has become divided and the prospects for legislative correction of judicial decisions correspondingly diminished. In this context, the policy impacts of the Court’s decisions about how to adapt an old statute to changing opinions and circumstances are sharpened.

The analysis above suggests that the rule of law requires that judges follow the general intention of the enacting Congress even when adapting the statute to a new problem that Congress did not specifically consider. The *Massachusetts v. EPA* dissent did not follow the law, nor would its opinion preserve some threatened prerogative of Congress as a whole. Instead, the dissenting Justices voted, in effect, to conform the statute to the views of much of the Republican Party.415 Judges should not conform a statute to current political opinion when it matters—when political opinion is too divided to allow an override—because in that circumstance they can only conform the statute to one party’s opinion not to a widely shared political preference. Instead, judges should follow statutory purpose and text revealing an intention about the matter before them, even when the consensus undergirding the original statute has shattered.

But in cases where such a general intention does not provide clear guidance about how to resolve an issue before the Court, the Court must make a policy decision about how the statute should apply to the new problem. In other words, sometimes dynamic statutory interpretation that reflects changes in views is inevitable because, as Eskridge argues, archaeological approaches sometimes

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414. *See supra* note 413 and accompanying text.

415. *See Massachusetts v. EPA*, 549 U.S. 497, 560 (2007) (concluding that EPA should be granted discretion in deciding not to regulate greenhouse gases and noting that the “alarm over global warming may or may not be justified”).
provide no convincing connection to the intentions of the enacting Congress.416

As a practical matter, judges will tend to resolve such open questions based on their own views. Such a practice raises constitutional concerns, which we analyze, but do not completely resolve.417

The Court has frequently rejected judicial policymaking and suggested it is constitutionally suspect.418 Doctrinally, this view emerges perhaps most clearly in cases disfavoring the creation of federal common law.419 But if the Constitution disfavors judicial policymaking and congressional intent does not resolve a case, what should a judge do?

In practice, judges tend to enact the views of the elites of which they are a part into law.420 The CAA case study provides examples of this tendency in what we might call the “law and economics cases”—the cases construing “appropriate and necessary” and the Good Neighbor Provision to embrace consideration of cost.421 These cases echo the Lochner-era cases, discussed by Eskridge, in which the Supreme Court conformed the antitrust statutes to elite views by using them to authorize injunctions against labor actions.422 In all of these cases, the dynamic statutory constructions conformed statutes to fairly well developed views amongst intellectual and policymaking elites.

416. See Eskridge, supra note 10, at 14.

417. Cf. id. at 108 (admitting that he cannot fully answer the question of how judges should conduct dynamic statutory interpretation).


420. See Eskridge, supra note 10, at 82 (discussing how judges created the federal labor injunction in conjunction with other legal elites).

421. See supra notes 352, 367 and accompanying text.

This approach to dynamic statutory interpretation raises constitutional concerns, because it seems to conflict with popular sovereignty. In the case of the CAA, opinion polls indicate that the public does not generally buy into the balancing approach that has captured the imagination of the elites. The labor injunction cases harmed the reputation of the *Lochner*-era Court, because ideological decision-making appears illegitimate, and Congress repudiated many of these cases on several occasions, finally leading the Court to renounce its elitist approach to antitrust law.423

The idea that popular opinion should govern the resolution of issues requiring dynamic statutory interpretation draws support from the Constitution’s preamble, which states that “we, the people . . . establish” the Constitution and by its provisions establishing policymaking authority in an elected Congress and, to some extent, in an elected President.424 The idea that the entire government derives its authority from the people suggests that the Court should follow popular rather than elite views.

On the other hand, the Constitution tempers popular democracy, reflecting some anxiety about the possibility of democratic excess. These anxieties led to creation of the Senate, the electoral college, the separation of powers, and an unelected judiciary with lifetime tenure.425 For these reasons, it is hard to
argue that the Constitution wholly precludes independent elitist policymaking by the judiciary, however troubling that might be.426

We have some doubts about whether the Court could accurately follow current popular views in resolving questions that past congressional intent cannot resolve even if it chose to do so. Opinion polls can be unreliable and may not track the issues before the Court with sufficient precision. Yet, some awareness by judges that their most natural inclinations may prove at odds with popular views should temper their approach to dynamic statutory interpretation.

The tendency of judges to follow elite views appears most troubling when it influences the outcomes in cases that do not pose new problems and therefore do not seem to require dynamic statutory interpretation. The law and economics cases appear troubling in part because the problems they dealt with, while perhaps not resolved clearly by statutory text, were anticipated by Congress.427 One would expect the CAA’s philosophy, which reflects popular opinion, rather than the judiciary’s elitist approach to control such cases. Dynamic statutory interpretation based on elite views seems more appropriate when confronting a new problem not anticipated by Congress, such as the problem of the scope of greenhouse gas regulation that the UARG Court confronted.

Chevron, whatever its weaknesses, does provide a resource for ameliorating some of the dilemmas arising in cases demanding or tending to trigger dynamic statutory interpretation.428 The Court

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427. See supra notes 333, 345, 346, 352, 367 and accompanying text.

could defer to EPA, instead of acting on its own when the statute is ambiguous. But the CAA cases involving Chevron deference suggest that Chevron has not constrained ideological decision-making, because the Justices apply it so selectively. They refuse to defer to the Obama EPA’s interpretation of the completely open-ended clause “appropriate and necessary” but many of them find a provision defining a pollutant as including any substance emitted into the ambient air sufficiently ambiguous to justify deference to the Bush EPA.

One of us has suggested that the Roberts Court reflects, to some degree, the polarization of our times in its constitutional decision-making. This case study suggests that the same thing has happened in the context of an extraordinarily detailed and prescriptive statute, the CAA. Increasingly, these divisions occur in archaeologically easy cases (like Massachusetts v. EPA), not just in hard ones. And this division often occurs as the Justices engage in dynamic statutory interpretation in cases that might be resolved fairly easily by intentionalism. While Eskridge is surely right that dynamic statutory interpretation based on judicial views of sensible adaptation is inevitable in hard cases, it is troubling to see it have such a strong influence in easy ones.

VI. Conclusion

While statutory text and purpose played a major role in the CAA’s early years, increasingly the Court issues rulings divided

429. See id. at 843.
432. See KECK, supra note 300, at 13 (finding the Justices “polarized along partisan lines, but not as badly as members of Congress”).
along ideological lines, even in apparently easy cases. While some
dynamic statutory interpretation is inevitable, this Court
sometimes updates statutes to reflect political or elitist views not
embraced by a clear popular majority even in cases that do not
seem to require abandonment of an archaeological approach. Some
of this ideological updating occurs in the context of a new problem,
but some of it does not.

We suggest that judges should pay more attention to statutory
purpose in order to counter modern judges’ tendencies to update
the law to conform to their own preferences. At the same time, we
recognize that dynamic statutory interpretation is inevitable in
some cases and that the Constitution does not wholly preclude
updating to reflect new opinions. The modern Court’s CAA
jurisprudence, however, suggests an erosion of the rule of law and
an expansion of politics’ domain within the judiciary over time. We
find this expansion troubling, as one might imagine that a
prescriptive statute might constrain judicial decision-making more
effectively than an open-textured constitutional text.